TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 53

GEORGE WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES W. MILLER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED AUGUST 28, 1912.

(23,342)

(23,342)

UPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 336.

GEORGE WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES W. MILLER.

N ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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UDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 16, 1914.

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a RETURN TO WRIT.

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in Oklahoma City, Oklahoma, this 15th day of August, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

1 UNITED STATES OF AMERICA, *ss:*

To Charles W. Miller, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court *Court* of the State of Oklahoma wherein George Washington is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Samuel W. Hayes, Acting Chief Justice of the Supreme Court of the State of Oklahoma, this 26th day of July, in the year of our Lord one thousand nine hundred and twelve.

[Seal Supreme Court, State of Oklahoma.]

SAMUEL W. HAYES,
Acting Chief Justice of Supreme Court of Oklahoma.

Attest:

W. H. L. CAMPBELL,
Clerk of the Supreme Court,
State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

On this 27th day of July, in the year of our Lord one thousand nine hundred and Twelve, personally appeared Lloyd Thomas before me, the subscriber, and makes oath that he delivered a true

copy of the within citation to Charles W. Miller at Holdenville, Okla., on July 27, 1912.

LLOYD THOMAS.

Sworn to and subscribed the 27th day of July, A. D. 1912.

[Seal Clerk District Court, Hughes County, Oklahoma.]

T. E. NEAL,
Dis'ct Clerk.

[Endorsed:] Filed Jul- 29, 1912. W. H. L. Campbell, Clerk.

2 STATE OF OKLAHOMA,
County of Hughes, To wit:

I, Lloyd Thomas, being duly sworn, says that he was deputized by Samuel W. Hayes, acting chief justice of the Supreme Court of said state, to serve the citation in the case of George Washington against Charles W. Miller, and served the same upon said Miller on the 27th day of July, 1912, by delivering to him in person a copy thereof.

LLOYD THOMAS.

Subscribed and sworn to before me on this the 12th day of August, 1912.

[Seal Chas. M. Templeman, Notary Public, Hughes County.]

CHAS. M. TEMPLEMAN,
Notary Public in and for Hughes County, Oklahoma.

My Commission expires July 24, 1916.

Filed Aug. 14, 1912. W. H. L. Campbell, Clerk.

3 GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

To Lloyd Thomas:

You are hereby deputized by me to serve the citations in the above entieled cause upon the defendant in error, Charles W. Miller, and make due return thereon, as required by law, this 26th day of July, 1912.

SAMUEL W. HAYES,
Acting Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.

By JESSIE PARDOE, *Deputy.*

Filed Jul- 26, 1912. W. H. L. Campbell, Clerk.

4 Filed Jul- 26. 1912. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

To the Honorable John B. Turner, Chief Justice of the Supreme Court of the State of Oklahoma:

The petition of George Washington for a writ of error respectively shows: That heretofore, to wit, on the 26th day of June, 1911, there was tried in the District Court of Hughes County, State of Oklahoma, a case in which said Charles W. Miller was plaintiff and your petitioner and others *their* defendants.

That in said cause said plaintiff presented that he was the owner and — the quiet possession of the land therein mentioned and that your petitioner had no rights, title or interest in the same. Upon the trial of said case, your petitioner filed his answer wherein it was set forth that said lands were the allotment of one Waitie Washington who departed this life intestate on the 3d day of November 1907, without issue or descendants, and leaving him surviving your petitioner as his father, Sissie Cosar, his mother, and half brothers and sisters on the part of both father and mother; that your petitioner is a full blood Seminole Indian, and said Sissie is a full blood Creek Indian and said Waitie Washington was a Creek Indian, and were duly enrolled as such; and that said lands were duly allotted to the said Waitie Washington under an act of the Congress of the United States, entitled "An act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other purposes," passed on the first day of March 1901; and that at the time of the death of said Waitie Washington the laws of descent then in force in Indian Territory was chapter 49 of the Statutes of Arkansas as compiled in Mansfield's Digest of 1884, put in force in said territory by an act of congress, the last time, on the 28th day of April 1904, by an act entitled, "An act to provide for additional United States Judges in Indian Territory, and for other purposes" and that said
5 chapter 49 was in full force and effect at the time of the death of said Waitie and the title to said lands passed to his heirs thereunder; that on the 16th of July 1909, said Sissie Cosar made one Frank L. Warren a deed for said lands and the same was indirectly conveyed to said Miller and that on the 28th day of April, 1911, your petitioner was induced to make said Warren a deed for said lands in consideration of $30.00, so induced to make the same by and through said Warren and Miller representing to your petitioner at the time that he had no right or interest in said lands, whereupon your petitioner made said deed as aforesaid, and in his said answer filed herein as aforesaid, your petitioner ask- that said Warren and others be made parties hereto and that said deed

of your petitioner be cancelled, annulled and set aside and your petitioner be decreed to have a right, title and interest in said lands.

That upon the filing of said answer, said Miller without appearing to — said answer by demurrer, plea or reply, moved the court for a judgment thereupon in his favor and against this petitioner; whereupon said trial court on the 26th day of June 1911, entered up judgement on said motion in favor of said Miller decreeing to him the lands in controversy; and thereupon your petitioner moved said court for a new trial therein and the same was promptly overruled, to which action of the court your petitioner then and there excepted and immediately thereafter took an appeal to the Supreme Court of the State of Oklahoma, which is the highest court of said state having jurisdiction to hear and determine the matters therein involved; and said case coming on to be heard by said Supreme Court was by said court decided on the — day of —— 1912, affirming the judgement of said trial court and holding and determining, First: "Under these facts George Washington did not inherit any estate in and to his son's allotment. Second: Section six of the supplemental Creek agreement, approved June 30, 1902, was in force and effect at the time the descent was cast in this case, to-wit: November 3, 1907, and the terms thereof controlled in the devolution of said estate. 32 Stat. L. 500, Approved June 30, 1902. Third: Section 2 of the Act of Congress entitled, "An Act to provide for additional U. S. judges in the Indian Territory, and for other purposes" approved April 28, 1904, did not repeal, by implication, or otherwise, Section 6 of the said Supplemental Creek Agreement."

That upon the rendition of said decision, your petitioner
6 filed a motion before said Supreme Court asking for a rehearing thereon but the same was overruled on the 25th day of June 1912; and your petitioner now presents said matters and asks that a writ of error from said judgement or decree be allowed by your Honor to the Supreme Court of the United States.

Your petitioner further presents that as shown by the records and proceedings in this cause there was drawn in question the following federal questions and acts of congress:

First. The said act of Congress, approved on the first day of March 1901, under which said allotment was made, mentioned and referred to in the answer of your petitioner.

Second. The said Supplemental Creek Agreement, mentioned in said decision, approved the 30th June, 1902, and especially Section 6 thereof, whereby chapter 49 of Arkansas was put in force in said Creek Nation as the law of descent therein.

Third. Said Act of Congress approved on the 28th of April, 1904, mentioned in said action and in said decision, and whereby said chapter 49 of Arkansas was put in force by said act of Congress throughout the then Indian Territory; and that by said last two acts named putting in force said chapter 49 of Arkansas, as aforesaid, it became incumbent upon said respective courts in the trial of said cause to construe said acts and especially the provisions of said chapter 49 and thereby determine whether the lands in controversy became, upon the death of said Waitie Washington, an ancestral

estate, or a new acquisition, as made and provided for in said chapter 49.

Your petitioner further shows that said judgment and decision of said Supreme Court of the State of Oklahoma was and is a final judgement in the highest court of the State of Oklahoma in which a decision in said suit could or can be had; that federal questions were made and drawn in the said case, to-wit: as hereinbefore set out, and that said judgement and decision of said Supreme Court was repugnant to and in conflict with the laws of the United States as embraced and indicated in respective acts of Congress aforesaid; that the rights, title, and interests of your petitioner in and to said land arose out of said respective acts and that said decision
7 and judgments of said Supreme Court denies to your petitioner the said rights and interests in said lands; and that the decisions of said federal questions was necessary to the judgment rendered as aforesaid.

Wherefore your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of Oklahoma in said case and prays that a writ of error to said Supreme Court of the United States *to* be allowed; that citation be granted and signed; that the bond herewith presented be approved; and that the errors complained of may be reviewed in the Supreme Court of the United States and the judgement aforesaid of said Supreme Court of Oklahoma, be reversed, and your petitioner be restored to all his rights and interest in said lands.

LEWIS C. LAWSON,
Attorney and Counsel for Petitioner.

Holdenville, Okla.

The writ of error as praved for in the foregoing petition is hereby allowed this 24th day of July 1912, and the bond for the purpose of such writ of error is hereby fixed at $250.00 and the bond here presented signed by the said George Washington as principal and Johnson E. Tiger and Felix Canard as sureties in the penal sum of $250.00 payable to said Charles W. Miller is hereby approved.

[Seal Supreme Court, State of Oklahoma.]

SAMUEL W. HAYES,
Acting Chief Justice, Supreme Court of the State of Oklahoma.

Attest:

W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

Filed in my office this the 26" day of July 1912.

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

8 In the Supreme Court of the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Oklahoma, in the above entitled matter there is manifest error in this, to-wit:

First. That the said Supreme Court erred in holding and deciding that said lands in controversy belong to said Charles W. Miller and that said plaintiff in error had no right, title, interest or estate in or to said lands, without making or requiring to be made a party thereto the said Frank L. Warren, Union Central Life Insurance Company, L. U. Humphrey and L. L. Humphrey, as prayed for by said plaintiff in error in his said answer; in which said decision and holding, as aforesaid, there was drawn in question and necessarily decided Section 1 of the fourteenth Amendment of the Constitution of the United States, which declares that "No state shall make or enforce laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and that said decision and holding is repugnant to and in conflict with said section of said fourteenth Amendment and deprives the plaintiff in error of his right, title, interests and estate in and to said lands, without due process of law, and denies the said plaintiff the equal protection of the laws, as made and provided in said section.

Second. That the said court erred in holding that under the fact presented in the record and proceedings in this case the plaintiff in error, George Washington, did not inherit any estate in and to the said allotment of the said Waitie Washington deceased.

9 Third. That said court erred in holding and deciding that Section 6 of the Supplemental Creek Agreement, approved June 30, 1902, was in force and effect at the time the descent was cast in this case, to-wit: November 3, 1907, and the terms thereof controlled in the devolution of said estate.

Fourth. That said court erred in holding and deciding that Section 2 of the Act of Congress entitled, "An Act to provide for additional United States judges in the Indian Territory, and for other purposes" approved April 28, 1904, did not repeal, by implication or otherwise, Section 6 of said Supplemental Creek Agreement.

Plaintiff in error says that in the aforesaid suit there was drawn in question the aforesaid acts of Congress of the United States and the legal force and effect thereof wherein it was maintained by said plaintiff in error that the provisions of said act of Congress, approved on the 28th day of April, 1904, mentioned in said answer and decision, repealed Section 6 of said Supplemental Creek Agreement

and thereby change the law of descent, throughout Indian Territory, so that Chapter 49 of the Statutes of Arkansas as shown in Mansfield's Digest of 1884, thereby became the law of descent which governed the final disposition of the lands in controversy; and under which said chapter the plaintiff in error became entitled to at least a life estate in and to said lands to endure during his natural life; that upon his death the mother, Sissy Cesar, if then living, became entitled to a life estate in said lands, with the fee simple title thereto in the said children of the plaintiff in error living at the time of the death of Waitie Washington.

Plaintiff in error further contends that even though it should be ascertained and determined that said act of Congress of April 28, 1904, did not repeal said Section 6 of said Supplemental Creek Agreement, still said plaintiff in error took a life estate in said lands upon the death of said Waittie Washington under and by right of said Chapter 49 of said Statutes of Arkansas so put in force in said Creek Nation by said Section 6 of said Supplemental Creek Agreement; and that the provises provided for in said Section 6 are not repugnant to a life estate in said lands to this plaintiff in error but the same are consistent with such life estate; but that said Supreme Court in so holding and deciding said cause denied the validity of said act of April 28, 1904, wherein it repealed said Section 6; and also denied the validity of said Section 6 as applicable to the life estate of this plaintiff in error in and to said lands; and denied to this plaintiff in error all his rights, title, interests and estate in and to said lands arising under and by virtue of said respective acts of the Congress of the United States; and that said respective acts and sections thereof were directly in controversy in this suit and the rights and interests of this plaintiff in error were dependant upon the proper legal construction of the same and that such construction and decision was against the validity of said acts, as above indicated, and against the rights and interests of the plaintiff as guaranteed to the plaintiff in error under and by reason of said several acts and their proper legal construction; and that said Supreme Court of the State of Oklahoma is the highest court of said State in which a decision in this suit could be had.

Wherefore said plaintiff in error George Washington prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by this action and because of the said judgment and decision; and further, may have such other and further relief as may be proper and just.

Dated this 23d day of July, 1912.

LEWIS C. LAWSON,
Counsel for Plaintiff in Error.

Holdenville, Oklahoma.

Filed Jul- 26, 1912. W. H. L. Campbell, Clerk.

11 In the Supreme Court of the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

The above entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the state of Oklahoma, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matters.

It is ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is, hereby approved.

This 24th day of July A. D. 1912.

[Seal Supreme Court, State of Oklahoma.]

SAMUEL W. HAYES,
Acting Chief Justice of Supreme Court of State of Oklahoma.

Attest:
W. H. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

Filed Jul- 26, 1912. W. H. L. Campbell, Clerk.

12 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the said State of Oklahoma before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George Washington, plaintiff in error, and Charles W. Miller, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, of laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest

error hath happened to the great damage of the said George Washington as by his complaint appears. We being willing that error, if any hath been, should duly be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30*th* days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error, what of right, and according to the laws
13 and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 25th day of July, in the year of our Lord one thousand nine hundred and twelve.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of Oklahoma.

Allowed by
SAMUEL W. HAYES,
Acting Chief Justice of the Supreme Court of Oklahoma.

Filed Jul- 26, 1912. W. H. L. Campbell, Clerk.

14 Know all men by these presents, That we, George Washington, as principal, and Johnson E. Tiger and Felix Canard, as sureties, are held and firmly bound unto Charles W. Miller in the full and just sum of Two Hundred and Fifty dollars, to be paid to the said Charles W. Miller, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Fifteenth day of July, in the year of our Lord one thousand nine hundred and Twelve.

Whereas, lately at a term of the Supreme Court of the State of Oklahoma in a suit depending in said Court, between said George Washington, as plaintiff in error, and said Charles W. Miller, as defendant in error therein a decisions of said Supreme Court was rendered against the said George Washington and in favor of said Charles W. Miller and the said George Washington having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the decision in the aforesaid suit, and a citation directed to the said Charles W. Miller citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the

said George Washington shall prosecute his writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE WASHINGTON. [SEAL.]
JOHNSON E. TIGER. [SEAL.]
FELIX CANARD. [SEAL.]

Sealed and delivered in presence of—

C. M. TEMPLEMAN.

Approved by—

SAMUEL W. HAYES,
Acting Chief Justice of Supreme Court of State of Oklahoma.

15 STATE OF OKLAHOMA,
County of Hughes, To wit:

Personally appeared before me V. W. Snider, a notary public in and for said County of Hughes, State of Oklahoma, Johnson E. Tiger and Felix Canard whose names are signed to a bond on a writ of error to the Supreme Court of the United States, from a decision of the Supreme Court of the State of Oklahoma, in the case therein pending wherein George Washington is plaintiff in error and Charles W. Miller is defendant in error, No. 2815, and stated to me that they executed said bond as sureties thereon for said George Washington as principal therein for the purposes of said bond as shown on the face thereof, and that each of said sur-ties *are* worth, over and above all *their* liabilities, exemptions under the laws of said State of Oklahoma and otherwise the sum of Five Hundred Dollars ($500.00); and said sur-ties so certify by these presents, this the fifteenth day of July, 1912.

JOHNSON E. TIGER.
FELIX CANARD.

Taken, subscribed and sworn to before me on this the fifteenth day of July, 1912.

[Seal V. W. Snider, Notary Public, Hughes County, Oklahoma.]

V. W. SNIDER,
Notary Public in and for Said County and State.

My commission expires on the 17 day of August, 1912.

Filed Jul- 26, 1912. W. H. L. Campbell, Clerk.

16 Filed Jul- 6. 1911. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Petition in Error.

Comes now the plaintiff in error and for his cause of appeal herein charges and avers that on the 15th day of May, 1911, the defendant in error file- a suit in the district court of Hughes county, State of Oklahoma, against this plaintiff in error, Sissie Cosar and Lillian Cosar, an infant, to quiet the title to 160 acres of land situated in said county; that said defendant claimed some interest in said lands by reason of a deed obtained from said Sissie Cosar by one Frank L. Warren, dated the 16th of July, 1909, and on said date transferred by said Warren to one W. J. Smith, now deceased; that afterward one Cosar S. Penny as the administrator transferred said lands to the First National Bank; and on the 26th of January, 1910, said Bank pretended to make said Warren another deed for said lands, and on the same day said Warren deeded the same to said defendant in error who gave two mortgages thereon for about $1800.00 to different parties; that the lands were the allotments of one Waitie Washington who was the son of this plaintiff in error and said Sissie Cosar, and who died on the 3rd day of November 1907, leaving him surviving said Sissie his mother, this plaintiff in error, said Lillian Cosar an half sister and three other half brothers and sisters; that plaintiff in error and said Sissie were married about the year 1883, and lived together in the Creek Nation about ten years and of said marriage there were four children born two of who- died before the allotments of said Nation, one in 1901, and said Waitie in November, 1907 as aforesaid; that said Sissie left plaintiff in error about 1893, and took up with one Mac Cosar by whom said Lillian was born, and plaintiff also again married and has three children by his second wife all of whom are still living; that on the 14th day of June 1911, this plaintiff in error filed his answer in said action setting up therein that he was the owner of either a life estate in said lands or an undivided one half interest therein in fee
17 simple, and asked that the same be placed in the hands of a receiver until such matters could be heard and fully determined; that plaintiff in error gave notice of the appointment of a receiver therein and the same came on to be heard on the 17th of June, 1911, page 17, and the matters were taken under advis-ment by the court, page 21, and on the 26th day of said month, overruled said motion to which action plaintiff in error excepted, page 36; that on the 16th of said month said Miller moved the court for jurment on the pleadings, page 20, whereupon said motion was on the 36th day thereof sustained and a judgment rendered in said

cause decreeing said lands to said defendant in error to all of which plaintiff excepted whereupon the plaintiff in error moved the court to set aside said order and judgment and grant him a new trial therein, page 23; but the court overruled said motion to which plaintiff in error again excepted, pages 26 and 27, all of which more fully appears from the case made thereof and which is hereto attached as part hereof.

Plaintiff in error submits that there are errors in said actions of the court upon the following grounds and for the following reasons:

First. Because the court erred in refusing to appoint a receiver herein in this cause to take charge of said lands during the pendency of this suit;

Second. Because the court erred in sustaining the motion of the defendant in error for judgment on the pleadings, there being no answer at that time filed for said infant Lil-ian Cosar and Sissie Cosar not having answered at all and the case not on docket or set for trial, as required by law;

Third. Because the court erred in decreeing that the defendant in error was the owner of said lands in controversy, and that the plaintiff in error had no right, title or interest therein and forever quieting the title thereto in said defendant in error, and for cost against plaintiff in error,

Fourth. Because the court erred in overruling the motion of the plaintiff in error for a new trial herein and for the reasons specifically set forth in said motion each of which are herein referred to and asked to be considered as part hereof:

18 & 19 Fifth. Because said judgment or decree herein rendered in favor of defendant in error and against plaintiff in error is not sustained by sufficient evidence, but is contrary to both the law and the evidence:

Sixth. Because said judgment decree is contrary to the pleadings in the case and is not sustained by such pleadings:

Seventh. Because of the numerous errors of law occurring at the trial of said cause and excepted to by the plaintiffs in error, as shown by the record.

For the foregoing reasons plaintiff in error prays that said judgment or decree herein entered be set aside, that this case be reversed and remanded with instructions to enter up a decree herein on behalf of the plaintiff in error and for his costs herein.

July 6th, 1911.

LAWSON & SAMPLES,
Counsel for Plaintiff in Error,
Holdenville.

Endorsed on Back: In the Supreme Court of the State of Oklahoma. #3815. George Washington, Plaintiff in Error, vs. Charles W. Miller, Defendant in Error. Petition in Error and case made. Lawson & Samples, counsel for Plaintiff in error. Warren & Miller, counsel for Defendant in Error. Filed Jul- 6 1911, W. H. L. Campbell, Clerk.

20 In the District Court of Hughes County, State of Oklahoma.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

Case-Made.

Be it Remembered, That heretofore, to-wit, on the 15th day of May, A. D. 1911, the plaintiff, Charles W. Miller, commenced this action against said defendants, George Washington, Sissie Cosar and Lillie Cosar, by filing in the office of the Clerk of the District Court of Hughes County, State of Oklahoma, his petition, which is in the words and figures following to-wit:

21 In the District Court of Hughes County, Oklahoma.

No. 801.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON, SISSIE COSAR and LILLIE COSAR, Defendants.

Petition.

Comes the plaintiff herein, Charles W. Miller and states that he is a resident of Hughes County, Oklahoma; that the defendants, Sissie Cosar and Lillie Cosar are residents of Hughes County, Oklahoma; that the defendant George Washington is a resident of Seminole County, Oklahoma, and that the land which is the subject matter of this action is situated — Hughes County, Oklahoma, and for cause of action herein, states:

That the said plaintiff is the owner of the legal and equitable estate in the Southeast Quarter of Section Thirty Six (36) Township Eight (8) North and Range Eight (8) East, and that he is in possession of the same; that the defendants, George Washington, Sissie Cosar and Lillie Cosar, claim some estate or interest in and to said land; that the said defendants have no right, title, estate or interest in and to said land and that their claim of same is a cloud upon the title of this plaintiff; that the defendant Lillie Cosar is a miner of the age of thirteen years.

Wherefore plaintiff, Charles W. Miller, prays that a guardian ad litem be appointed for the said infant, Lillie Cosar; that the Court decree that the said George Washington, Sissie Cosar and Lillie Cosar have no estate or interest in and to the land above described and that they be perpetually enjoined from asserting any right, title or claim to same, and that the Court further decree that the said plaintiff is the owner of said land and that the title to same be quieted in him and for all proper relief.

WARREN & MILLER,
Attorneys for Plaintiff.

22 On the back of said petition, omitting the number and title of said cause, appears the following endorsement: Petition. District Court, County of Hughes, State of Oklahoma. Filed May 15 1911. T. E. Neal, District Clerk.

23 That thereafter, and on the 14th day of June A. D. 1911, the defendant George Washington, filed in said court his answer to the petition of plaintiff filed herein, which said answer is in the words and figures following, to-wit:

24 No. 801.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

Answer of George Washington.

Comes now the defendant, George Washington, and desiring to facilitate this cause as rapidly as possible, hereby waives the signature of the plaintiff or his counsel herein to the petition, and likewise all grounds of demurrer thereto, and for his answer to the said petition herein filed, denies each and every charge, statement and allegation made and contained in said petition except that the defendant is claiming an interest in the land mentioned and described in said petition and as to that charge says that the same is true and defendant does claim an estate right and interest in said lands as hereinafter set forth:

Second. And for further answer herein and by way of affirmative matters herein -his defendant charges and avers:

1st. That this defendant is a full blood Seminole Indian and so enrolled upon the rolls of the Seminole Nation of Indians of the Indian Territory; that his roll number thereon is 413; that he is now fifty two years old; that he has always lived and resided in said Nation and in the Creek Nation of said Territory; that defendant Sissie Cosar is a full blood Creek Citizen and so enrolled upon the Creek rolls of said Creek Nation; that about the year eighteen hundred and eighty three (1883), this defendant and said Sissie Cosar were married to each other in said Creek Nation, and thereafter lived, resided and cohabited together as husband and wife for a period of about ten years, or until about the year 1893; that defendant and said Sissie were living and cohabiting together as husband and wife on the 2nd day of May, 1890, and for many years prior and subsequent thereto; that of said marriage between defendant and said Sissie, as aforesaid, there were four children born to

25 defendant and said Sissie, during the time they so lived and cohabited together as husband and wife; that the eldest child was named Gibson Washington and died before enrollment; that the second child died when but three days old, un-named; that the third child was named Willie Washington, and died, after enrollment, about the month of —— 1901, intestate and an infant;

that the fourth child was named Waitie Washington, and died, intestate, and an infant on or about the 2nd or 3rd day of November, 1907, leaving him surviving this defendant as his father, said Sissie Cosar as his mother, and said Lillian Cosar a half sister *as* the part of his mother and three other children on the part of defendant, named Widie Washington, Willie Washington and Lena Washington, who are half brothers and sisters of said Waitie Washington but are Seminoles; that after the birth of said first four named children, said Sissie left this defendant and claimed to have procured a divorce from defendant, and then took up with said Mack Cosar with whom she is now living; whereupon this defendant married his present wife Hepsey Washington and by her, said defendant had said three children, Wadie, Willie and Lena Washington, all of whom are still living.

Third. That said Waitie Washington was a minor at the time of his death, and was unmarried and left no children or descendants of any child or children, surviving him at the time of his death; that said Watie was enrolled as a full blood Creek Citizen, and his roll number was 5494 that he was duly enrolled on the 7th day of March, 1900; and that the lands in controversy in this suit was the allotment made and assigned to said Watie Washington as his proportional part of the Creek Nation, on the final allotment of said Nation, and the same was so allotted and the patents therefor were issued and recorded and delivered, during the lifetime of said Waitie; that said lands were so allotted to said Waitie under and by virtue of an Act of Congress entitled "An act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other purposes," passed on the first day of March, 1901; and at the time of his death, said lands passed by the laws of descent then in force in said Indian Territory which was chapter forty nine of the Statutes of Arkansas as compiled in Mansfield's Digest of
26 1884, put in force in said Territory by an act of Congress, the last time, on the 28th day of April, 1904 by an act entitled, "An act to provide for additional United States judges in Indian Territory, and for other purposes"; and that said chapter 49 had on several other times before the death of said Waitie Washington been put in force on said Territory, and was in full force and effect in said Territory at the time of his death as aforesaid, and the title to said lands passed to his heirs thereunder;

Fourth. That on or about the 16th of July, 1909, said Sissie Cosar and said Mack Cosar pretended to make and execute to one Frank L. Warren a deed for said lands hereinbefore mentioned and described, and on the same day pretended to have the same approved by the County Court of said County of Hughes, and the same were placed of record in the office of the register of Deeds of said County, in Deed Book, No. "B" on page 579 etc.; that on the same day and date, said Warren pretended to convey the said lands to one W. J. Smith, (now deceased) and recorded in said office in Deed Book No. 1 on page 531; that on the 21st day of December, 1909, one Oscar S. Penny as the administrator of said Smith's estate pretended to make and execute to the First National Bank

of Holdenville, a deed for said lands and the same was placed of record in said office in Deed Book No. 4 on page 259; that on the 26th day of January, 1910, said Bank pretended to make and execute to said Warren another deed for said lands, and the same was placed of record in said office, in Deed Book, No. 4, on page 349; that on the same last named date said Warren and wife pretended to make and execute to said Charles W. Miller, the plaintiff herein, another deed for said lands, and the same was placed of record in said office in Deed Book No. 3 on page 397; and that on the 27th day of July, 1907, said Miller made and executed a mortgage upon said lands to secure to the Union Central Life Insurance Company, a corporation, of Cincinnati, Ohio, to secure it the sum of $1700.00, which said mortgage was likewise placed of record in mortgage Book No. 5 on page 376; and on the same date said Miller made
27 another mortgage on said lands to L. U. Humphrey and L. L. Humphrey, of Independence, Kansas, to secure the sum of $85.00, and the same was also placed of record in said office in mortgage Book No. 5 on page 400, a duly certified copy of said first mortgage is herewith filed as part hereof marked exhibit "A"; and a duly certified copy of said second mortgage is herewith filed as exhibit "B"; and that on the 28th day of April 1911, this defendant was induced by said Warren to make and execute to him a deed of quit-claim to all his right, title and interest in and to said lands, by representing to defendant that he, defendant, had no right, title or interest in and to the said lands; that defendant went to said Warren & Miller who are partners in the practice of law, for the purpose of obtaining advice as to the rights and interests of defendant in and to said lands and was then and there informed by them that defendant had no rights or interest in said lands; whereupon defendant then and there started out of the said office of Warren & Miller, the said Miller being the plaintiff in this suit, and was called back by them and told that if defendant would sign the paper presented to him, they would give defendant some money and then and there offered defendant $25.00 to sign the same, but defendant refused to sign the same for said sum whereupon said Warren & Miller offered defendant the sum of $30.00 to sign the same; and defendant thus being advised that he had no interest in said lands by said Warren & Miller, concluded to take said $30.00 and did so, thinking at the time he had no interest in said lands and was so induced to think he had nothing therein by the advices of said Warren & Miller to whom he thus went for legal advice as to said matters, and then and there signed some kind of a paper for them, which now seems to have turned out to be a deed for said lands or his interest therein, which was placed of record in said office in Deed Book No. 8 page 40, a duly certified copy of which is herewith filed as part hereof, marked exhibit "C"; that said paper above referred to is the only paper defendant ever signed for said Warren & Miller or either of them, respecting said lands:

Fifth. That defendant is now informed and believes and so charges that he was entitled to either an undivided one half
28 interest and estate in and to said lands in fee simple, or to an estate for life in and to all of said lands, as an heir of the

said Waitie Washington; that defendant did not know these facts at the time of so signing said pretended deed to said Warren, dated the 28th day of April, 1911, but, as aforesaid, was induced, before signing the same by said Warren & Miller, to believe, and defendant did believe that he had no interest therein, and being thus mislead by such misrepresentations so made to him by said Warren & Miller defendant accepted sair $30.00 and made or executed said paper to said Warren, as aforesaid; that said $30.00 was all the consideration which defendant ever got from said Warren for his interest in and to said lands, and the same is wholly inadequate consideration; that there is far more than one half of said lands in actual cultivation, and all of said lands are situated within about one mile of the county seat of Hughes County, and said lands are easily worth $30.00 an acre at the least, and very valuable and consist of 160 acres:

Sixth. That defendant has always lived and resided among the Seminole and Creek citizens of said Indian Territory, and can neither speak or understand the English language and can not converse in said language; that he has never been accustomed to the transactions of business of any great importance, and does not know much about such matters; that he is a full blood Seminole Indian and is so enrolled on the rolls of said Nation, and said pretended deed to said Warren for his interest in said lands as shown by said exhibit "C", is absolutely null and void, and passed no right, title or interest in said lands because the same was never approved by the Secretary of the Interior; nor was the same ever approved by any county court of said state, so far as defendant knows; that the same was thus procured from defendant under the misapprehension aforesaid that defendant really had no title thereto, and so induced to believe by said Warren & Miller, in the way and manner aforesaid, and thereby defendant was thus induced to so make said deed for said $30.00 as hereinbefore stated; that all of said children aforesaid who thus survived said Waitie Washington are still minors, and entitled to participate in the division of said lands in case defendant has only a life estate therein.

29 Defendant therefore prays that said Frank L. Warren, Union Central Life Insurance Company, and said L. U. Humphrey and L. L. Humphrey be made parties defendants herein; that said pretended deed of defendant to said Warren be canceled and declared null, void and ineffectual, and fraudulent, and entirely set aside; that said two mortgages aforesaid be set aside and canceled as to the rights and interests of this defendant in and to said lands; that a receiver herein be appointed to take charge of said lands and collect the rents and profits arising therefrom until the termination of this suit and the rights of all persons herein be determinated; that defendant be decreed either an undivided one half interest in and to said lands in fee simple, or to a life estate in all of said lands for and during his own life time, and all the rents on said lands etc, and such other, further and general relief herein as the nature of

this case may require or which to equity and good con-cience may seem proper. And he will ever pray etc.

GEO. WASHINGTON, *Defendant.*

LAWSON & SAMPLES,
Counsel for said Defendant.

STATE OF OKLAHOMA,
County of Hughes, to wit:

George Washington, being first duly sworn, says that he is the defendant named in the foregoing answer; that he knows the contents thereof, the same having been carefully read over to him in Creek and explained to him in said language; and that the statements, facts and allegation therein contained are true and correct.

GEO. WASHINGTON.

Taken, subscribed and sworn to before me on this the 14th day of June, 1911.

[SEAL.] T. E. NEAL,
District Clerk.

Lien Claimed.

30 2816.

Charles W. Miller.

The Union Cent. Life Ins. Co.

Mortgage.

This mortgage, Made this 27th day of July, in the year, 1909, by Charles W. Miller, a single man, of lawful age, of Hughes County, Oklahoma, Mortgagor, party of the first part, and The Union Central Life Insurance Company, a corporation of Cincinnati, Ohio, mortgagee, party of the second part:

Witnesseth: That the mortgagor mortgage to the mortgagee the following described real estate, situated in Hughes County, Oklahoma, to-wit:

Southeast quarter (¼) of Section Thirty six (36), Township Eight (8) North, Range Eight East, of the Indian Meridian, containing in all 160 acres, more or less, according to Government Survey thereof, with all improvements thereon and appurtenances thereto belonging and warrant the title to the same, as security for the payment to it of a debt evidenced by certain promissory notes, executed concurrently with this mortgage by Charles W. Miller, party of the first part, and payable to the party of the second part, or order, and bearing the same date as this mortgage, and described further as follows:

One certain promissory note for the sum of Seventeen Hundred Dollars (for the principal sum loaned) payable on date therein specified (or in partial payments prior to maturity in accordance

with stipulation therein) with interest from date until paid at the rate therein specified; interest until maturity being evidenced by interest coupon notes of even date, which draw ten per cent per annum after maturity, payable annually until paid.

The party of the first part hereby Covenant and Agree with the party of the second part as follows:

First. The party of the first part does hereby release, relinquish and waive all rights or claims of homestead exemption and do hereby include such rights, or claims in this mortgage.

Second. To pay all taxes, assessments and charges of every character which are now due, or which hereafter may become liens on said real estate to pay all taxes assessed against the said second party on the note or debt secured hereby before the same becomes delinquent and deliver to the second party receipts for the payment thereof. If not paid, the holder of this mortgage may elect to pay such taxes; liens or assessments and be entitled to interest on the same at the rate of ten per centum per annum and this mortgage shall stand as security for the amount so paid with interest.

Third. To keep all buildings, fences and other improvements on said real estate in as good repair and condition as the same are in at this date, and shall permit no waste, and especially no cutting of timber, except for the making and repairing of fences on the place, and such as shall be necessary for firewood for the use of the grantor's family.

Fourth. To keep the buildings on said premises insured in some responsible joint stock Company, approved by the party of the second part, for the insurable value thereof, with the second party's form of assignment attached, making said insurance payable in case of loss to the party of the second part, as its interest may appear and deliver the policy and renewal receipts therefor to the mortgagee herein. In case of failure to keep said buildings so insured the holder of this mortgage may effect such insurance and the amount so paid shall be collectible with the notes herein, with interest, at ten per centum per annum, and this mortgage shall stand as security therefor.

31 Fifth. They further agree, that if any of said notes shall not be paid or there is failure to pay any notes given as evidence of interest on any extension of the time of payment of the debt herein secured, when the same shall be due, or to conform to or comply with any of the foregoing covenants or agreements, the whole sum of money herein secured shall thereupon become due and payable at the option of the second party, without notice and this mortgage may be foreclosed.

Sixth. To waive, and they do hereby waive all benefits of stay, valuation or appraisement laws of the State of Oklahoma.

Seventh. The party of the first part hereby agrees to pay to the party of the second part, all costs and expenses including attorney's fees to which it may be put in protecting the title herein warranted, or in any suit involving the mortgage security, and also all expenses which the second party may incur should it be necessary for it to appear in any of the Land Departments or offices of the General

Government in connection with the title herein, all such costs, expenses and attorney's fees to be secured hereby with interest at ten per cent, per annum.

Eighth. In case of foreclosure proceedings the party of the first part hereby agrees to pay to the party of the second part the sum of $170.00 as attorney's fees for such suit payable upon filing of the petition, the same to be secured hereby with interest at ten per cent per annum.

The foregoing covenants and conditions being kept and performed this conveyance to be void, and this mortgage to be released at the expense of said party of the first part, and release to be recorded at cost of said party of the first part, otherwise to continue in force and effect.

In testimony whereof, The said party of the first part has hereunto set his hand.

CHARLES W. MILLER.

STATE OF OKLAHOMA,
Hughes County, ss:

Before me, a notary public, in and for said county and State, on this 29th day of July, 1909, personally appeared Charles W. Miller, a single man of lawful age, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

[SEAL.] EDWIN R. NIX,
Notary Public.

My commission expires Feb. 10th, 1913.

Filed for record on 28 day of Jan. A. D. 1910, at 3:05 o'clock P. M.

C. C. LEACH,
Register of Deeds.
By NORA ROBINSON, *Dep.*

On the back of said mortgage, appears the following endorsement:

STATE OF OKLAHOMA,
County of Hughes, ss:

I, C. C. Leach, Register of Deeds, in and for the county and State above named do hereby certify, that the foregoing is a true and correct copy of a like instrument now of record in my office in Book 5 of Mtgs. at page 376.

Witness my hand and official seal this 14 day of June, 1911.

[SEAL.] C. C. LEACH,
Register of Deeds

1.25 pd.

Exhibit "A."

32 2876.

Charles W. Miller.

Humphrey & Humphrey.

Mortgage.

Know all men by these presents, That Charles W. Miller, a single man, of lawful age, of Hughes County, State of Oklahoma; first parties, for and in consideration of the sum of Eighty five and no/100 Dollars, the receipt of which is hereby acknowledged, do hereby mortgage and convey to Humphrey & Humphrey (a firm composed of L. U. Humphrey and L. L. Humphrey) of Independence Kansas, second party, the following described real estate and premises situated in Hughes County, State of Oklahoma, to-wit:

Southeast quarter (¼) of Section Thirty six (36) Township Eight (8) North, Range Eight (8) East, of the Indian Meridian, containing 160 acres, more or less, according to the Government survey, together with all rents and profits therefrom, and all improvements and appurtenances now or hereafter in any wise belonging thereto and the said first parties hereby warrant the title thereto against all persons whomsoever. This mortgage is given subject to a mortgage of even date herewith to The Union Central Life Insurance Company, securing the sum of $1,700.00.

This mortgage is given to secure the payment of the full sum of $85.00 as evidenced by two promissory notes of even date herewith, signed by said first parties payable to the said second party as follows:

Forty five and no/100 Dollars on the 27th day of July, 1910.

Forty and no/100 Dollars, on the 27th day of July, 1911, with interest thereon at the rate of ten per cent per annum, after maturity, until paid, principal and interest payable at the office of Humphrey & Humphrey in Independence, Kansas.

It is expressly agreed that if the first parties shall pay the said sum or sums of money above provided at the times the same are made due and payable, then these presents shall become null and void and the second party shall release the same of record. But in case of failure of the first parties to pay the said sum or sums of money hereby secured when due, or any taxes or assessments levied against said above described property before delinquent or any other liens that may attach to said property before foreclosure, or shall permit default to be made in the performance of any of the conditions of the first Mortgage above mentioned, then the whole sum or sums of money hereby secured shall forthwith become due and payable at the option of the second party and no demand or notice shall be necessary before commencement of suit to foreclose this mortgage; and in case of foreclosure hereof or suit to collect the money hereby secured the first parties agree to pay a reasonable

attorney's fee as provided in said notes, in addition to all other legal costs and fees; and the first parties hereby waive all benefit of the appraisement, stay and homestead exemption laws of the State of Oklahoma.

In Witness Whereof, the said parties of the first part have hereunto set his hands this 27" day of July, 1909.

CHARLES W. MILLER.

STATE OF OKLAHOMA,
Hughes County, ss:

Before me, a Notary Public, in and for said County and State, on this 29th day of July, 1909, personally appeared Charles W. Miller a single man of lawful age, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

[SEAL.] EDWARD R. NIX,
Notary Public.

My commission expires Feb. 10th, 1913.

Filed for record on 15 day of Feb. A. D. 1910 at 2:40 O'clock P. M.

C. C. LEACH,
Register of Deeds.
By NORA ROBINSON, *Deputy.*

Exhibit "B."

33 On the back of said mortgage, appears the following endorsement:

STATE OF OKLAHOMA,
County of Hughes, ss:

I, C. C. Leach, Register of Deeds, in and for the County and State above named, do hereby certify that the foregoing is a true and correct copy of a like instrument now of record in my office, in Book 5 of Mtgs. at page 400.

Witness my hand and official seal this 14 day of June, 1911.

C. C. LEACH,
Register of Deeds.

75 ct. pd.

34 *Quit Claim Deed.*

This indenture, Made this 28th day of April A. D. 1911, between George Washington of Sasakawa, Oklahoma, of the first part, and Frank L. Warren, of Holdenville, Oklahoma, of the second part, Witnesseth, That the said party of the first part, in consideration of the sum of Thirty and No/100 ($30.00) Dollars to him paid, the receipt whereof is hereby acknowledged, have Remised, released, conveyed and Quit Claimed, and by these presents does quit claim

unto the said party of the second part, and to his heirs and assigns forever all his right, title, interest, estate, claim and demand, both at law and equity of, in and to all the following property to-wit:

The Southeast quarter of Section thirty six (36) Township Eight (8) North, and Range Eight (8) East, Hughes County, Oklahoma, being the land that was allotted to Waitie Washington, together with all and singular the hereditaments and appurtenances thereunto belonging.

To have and to hold, the above described premises unto the said Frank L. Warren, his heirs and assigns; so neither he the said George Washington or any person in his name or behalf, shall or will hereafter claim or demand any right or title to the said premises or any part thereof; but they and every one of them shall by these presents be excluded and forever barred.

In witness whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

GEORGE WASHINGTON.

Witnesses:
CONUKY LONG.

STATE OF OKLAHOMA,
Hughes County, ss:

Before me, T. E. Smith, a Notary Public in and for said County and State, on this 28th day of April, 1911, personally appeared George Washington to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above written.

[SEAL.] T. E. SMITH.
Notary Public.

My commission expires 12/12 1914.

This instrument was filed for record on the 28th day of April A. D. 1911, at 3:05 o'clock P. M.

C. C. LEACH.
Register of Deeds.

Exhibit "C."

On the back of said quit claim Deed, appears the following endorsement:

STATE OF OKLAHOMA,
County of Hughes, ss:

I, C. C. Leach, Register of Deeds, in and for the County and State above named, do hereby certify, that the foregoing is a true and correct copy of a like instrument now of record in my office, in Book 8 of Deeds at page 40.

Witness my hand and official seal this 14 day of June 1911.

C. C. LEACH.
Register of Deeds.

35 On the back of said Answer, omitting the number and title of said cause, appears the following endorsement: Dist. Court, County of Hughes, State of Oklahoma. Filed June 14, 1911. T. E. Neal, District Clerk. Lawson & Samples, Counsel for Defendant. Lien Claimed. Lien Claimed.

36 That thereafter, and on the 15th day of June, A. D. 1911, the defendant, George Washington, filed in said Court his notice to the plaintiff, Charles W. Miller, that said defendant would asks the Court on June 17th, 1911, to appoint a receiver to take charge of the land in controversy and the rents and profits arising therefrom, which said Notice is in the words and figures following, to-wit:

37 In the District Court of Hughes County, State of Oklahoma.

No. 801.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

To Charles W. Miller:

Take notice that on Saturday morning at 9 A. M. thereof, on the 17th day of June, 1911, at the court house of said County, the defendant George Washington will move the said District Court to appoint a receiver in the above styled cause to take possession of said lands and the rents and profits therefrom arising, during the pendency of said suit; and you are further notified that on the hearing of said motion, said defendant will use and rely upon his sworn answer therein filed on the 14th day of June, 1911, and of all of which take due notice.

This June 15th, 1911.

LAWSON & SAMPLES,
Counsel for said Defendant.

STATE OF OKLAHOMA,
Hughes County, ss:

H. S. Samples, of lawful age, being first duly sworn, deposes and says: I served a true, exact and correct copy of the above notice upon Charles W. Miller on this 15th day of June, A. D. 1911.

H. S. SAMPLES.

Subscribed and sworn to before me this the 15th day of June, 1911.

T. E. NEAL,
Clerk of the District Court.

On back of said notice, omitting the number and title of said cause appears the following endorsement: District Court, County of Hughes, State of Oklahoma. Filed June 15, 1911. T. E. Neal, District Clerk.

38 That thereafter, and on the 16th day of June, A. D. 1911, the Plaintiff filed in said Court his motion for Judgment on The Pleadings, which motion is in the words and figures following, to-wit:

39 In the District Court for Hughes County, Oklahoma.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

Motion for Judgment on the Pleadings.

Comes now the within plaintiff, Charles W. Miller, and respectfully moves for judgment on the pleadings against the defendant, George Washington, for the relief prayed for in the petition, and for his reason therefor states that the answer of the defendant, George Washington, filed herein affirmatively shows that the defendant, George Washington, has no defense to this action, and that the plaintiff herein is entitled to the relief sought against him.

WARREN & MILLER,
Attorneys for Plaintiff.

On back of said motion, omitting the number and title of said cause, appears the following endorsement: Filed June 16, 1911. T. E. Neal, Clerk, by A. F. Hall, Deputy.

40 That thereafter, and on the 16th day of June, A. D. 1911, the Court made an order in said cause, which said order is in the words and figures following, to-wit:

Be it Remembered that on this the 16th day of June, 1911, the same being one of the regular days of the June 1911 Term of the District Court of Hughes County, Oklahoma, there being present the Honorable John Caruthers, Judge R. Edmonds, Sheriff, T. E. Neal, Clerk, and public proclamation of the opening of court having been made, the following proceedings were had, to-wit:

No. 801.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

Motion Taken under Advisement.

Now on this the 16th day of June, 1911, both parties hereto are present by counsel and plaintiff's motion for judgment on the pleadings is argued and submitted to the court and is by the court taken under advisement until next Monday or later.

And now it is ordered that Court adjourn until Monday morning June 19th, 1911, at 10:30 o'clock.

JOHN CARUTHERS,
District Judge.

41 That thereafter, and on the 26th day of June, A. D. 1911, the defendant George Washington, filed in said Court his motion for a new trial, which said motion is in the words and figures following, to-wit:

42 In the District Court of Hughes County, State of Oklahoma.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

Comes now on this 26th day of June, 1911, the defendant, George Washington, and moves the Court to set aside the order herein refusing to appoint a receiver therein and also the judgment herein entered on this day decreeing to the plaintiff herein the lands and rents thereon arising, and grant said defendant a new trial in this case for the following reasons:

First. Because the Court erred in refusing to appoint a receiver as prayed for in the answer of said defendant under his motion therefor:

Second. Because the Court erred in sustaining the motion herein of plaintiff for judgment in his favor upon the pleadings in the case and against this defendant:

Third. Because the Court erred in decreeing said lands and rents to the plaintiff, as against said defendant, said lands being the same mentioned and described in the pleadings in said cause:

Fourth. Because said order and judgment are not sustained by sufficient evidence adduced in the case, but are contrary to both the law and the evidence in the case:

Fifth. Because of the numerous errors of law occurring at the trial of the case, and excepted to by this defendant.

LAWSON & SAMPLES,
Counsel for Defendant, George Washington.

43 On the back of said motion, omitting the style of said cause, appears the following endorsement: District Court, County of Hughes, State of Oklahoma. Filed June 26, 1911. T. E. Neal, District Clerk.

44 That thereafter, and on the 26th day of June, A. D. 1911, the Court made and entered a judgment and decree in said cause, which said judgment and decree is in the words and figures following, to-wit:

Be it remembered that on this the 26th day of June, 1911, the same being one of the regular days of the June 1911, Term of the District Court of Hughes County, Oklahoma, there being present

the Honorable John Caruthers, Judge C. R. Edmonds, Sheriff, T. E. Neal Clerk, and public proclamation of the opening of court having been made, the following proceedings were had, to-wit:

45 In the District Court for Hughes County, Oklahoma.

No. 801.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

Decree.

The within cause coming on to be heard on this the 26th day of June, 1911, on the motion of plaintiff for judgment on the pleadings in favor of the said plaintiff, Charles W. Miller, against the defendant, George Washington, for the relief prayed for in the petition, and upon application for receiver by defendant, Washington, and the plaintiff appearing in person and by Warren & Miller his attorneys, and the defendant, George Washington, appearing by his attorneys, Lawson & Samples, and it being admitted in open Court by the said defendant, George Washington, that the plaintiff is in possession of the premises in controversy, and the said motion being submitted to the Court on the argument of counsel, and the court being fully advised and fully satisfied in the premises, finds that the said motion for judgment should be sustained by the court, and said application for receiver be denied to which defendant, Washington, excepts.

It is therefore ordered, adjudged and decreed that the plaintiff Charles W. Miller, is the owner and in the possession of the Southeast Quarter of Section Thirty six (36) Township Eight (8) North, and Range Eight (8) East, and that the defendant, George Washington, has no right, title or interest therein, and that the title to said premises as against the defendant, George Washington, is forever quieted in the said plaintiff, Charles W. Miller, and that the said plaintiff have judgment against the defendant, George Washington, for all the costs in this action created in and about the defense of the said George Washington, in this action:

Whereupon said defendant on this date filed his motion herein for a new trial herein and that said judgment and order be set
46 aside, which motion being heard by the Court is overruled to which actions the said defendant again excepts, and prays for an appeal to the Supreme Court from said order refusing to appoint a receiver herein and from said decree or judgment decreeing said lands to the plaintiff herein, and the same is hereby granted, and the said defendant is given three days from this date in which to prepare and serve a case-made herein upon said plaintiff, and said plaintiff is given two days after being so served with said case made, as provided by law, in which to suggest amendments thereto, and the case made to be signed and settled after one day's notice of the settlement

thereof, given by either party. And it is further ordered that Defendant's appeal Bond be fixed in the sum of $250.00, same to be approved by Clerk of this Court.

And now it is ordered that Court adjourn until to-morrow morning June 27th, 1911, at 8:30 o'clock.

JOHN CARUTHERS,
District Judge.

47 That thereafter, and on the 24th day of June, A. D. 1911, the defendant, Lillie Cosar, a minor, by her guardian ad litem, filed in said Court here answer to the petition of plaintiff filed herein, which said answer is in the words and figures following to-wit:

48 In the District Court of Hughes County, State of Oklahoma.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON, SISSIE COSAR, and LILLIE COSAR, Defendants.

Answer of Guardian ad Litem.

Comes now Lillie Cosar one of the above named defendants, by Ralph P. Welch, Guardian ad litem, duly appointed by the Court in and for this case, and for answer to the petition of plaintiff filed herein, denies each and every allegation therein contained, and asks the Court to hold said plaintiff to strict proof of the same.

LILLIE COSAR, *Defendant.*
By RALPH P. WELCH,
Guardian ad litem.

On the back of said answer, omitting the number and the title of said cause, appears the following endorsement: Answer of Guardian ad litem for defendant Lillie Cosar. District Court, County of Hughes, State of Oklahoma. Filed June 24, 1911. T. E. Neal, District Clerk.

49 The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made, and all rulings and orders made thereon; all exceptions taken by the defendant to such rulings and orders; exception by plaintiffs, all the evidence offered, introduced or received upon the trial; all the Judgments of the court and exceptions of the defendant thereto; and the same is a true and correct statement and complete transcript of all the pleadings, motions, evidence, findings, judgments and proceedings in said cause.

LAWSON & SAMPLES,
Attorneys for Defendant, George Washington.

In the District Court of Hughes County, State of Oklahoma.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

To the above named plaintiff and his attorneys of record, Warren & Miller:

The above and foregoing case-made is hereby tendered to and served upon you, and each of you, as a true and correct case-made in the above entitled cause, and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in the above entitled cause.

LAWSON & SAMPLES,
Attorneys for Defendant, George Washington.

We hereby accept and acknowledge due, legal and timely service of the above and foregoing case-made on us, this — day of June, A. D. 1911.

——— ———,
——— ———,
Attorneys for Plaintiff.

50 STATE OF OKLAHOMA,
County of Hughes, ss:

I, H. S. Samples, of lawful age, being first duly sworn, deposes and says: I served, on the 26th day of June, 1911, the above and foregoing case-made upon Frank L. Warren, attorney of record in said cause for Plaintiff and of the firm of attorneys practicing law in the town of Holdenville, Oklahoma, under the firm name of Warren & Miller, and that the service was made as required by law and within the time granted by the order of the Court for said service in said cause.

H. S. SAMPLES.
One of the Attorneys for the Plaintiff, George Washington.

Taken, subscribed and sworn to before me this the 30th day of June, 1911.

[SEAL.]

T. E. NEAL,
Dist. Clerk.

51 In the District Court of Hughes County, State of Oklahoma.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

To Charles W. Miller, Plaintiff in the above style- cause, or to Warren & Miller, his attorneys:

Take notice that on the 30th day of June, A. D. 1911, at 3 o'clock p. m. or as soon thereafter as the matter can be taken up, at his

office in Okemah, in the County of Okfuskee, State of Oklahoma, the defendant George Washington, will make a motion before the Honorable John Caruthers, Judge of the ninth Judicial District Oklahoma, to settle and sign the case made in the above styled cause. This the 28th day of June, 1911.

LAWSON & SAMPLES,
Counsel for Defendant, Washington.

Served the above notice on the 28th day of June, 1911, by delivering to said Charles W. Miller a true copy thereof on said date.

H. S. SAMPLES.

Taken, subscribed and sworn to before me this 29th day of June, 1911.

T. E. NEAL,
Clerk of District Court.

52 In the District Court of Hughes County, State of Oklahoma.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

Comes now H. S. Samples, who being first duly sworn, says that he is a member of the firm of lawyers practicing in said county and state under the firm name of Lawson & Samples; that on the 26th day of June, 1911, affiant on behalf of and one of the counsel for defendant George Washington, offered to the plaintiff in the above-styled suit the original case-made in said cause whereupon said plaintiff, Charles W. Miller, refused to take the same and did not take the same, whereupon affiant then gave said original case made to Frank L. Warren of the firm of Warren and Miller, attorneys of record in said case for the plaintiff therein; that on the 28th day of June 1911, affiant gave said Miller a notice that on the 30th day of June, 1911, at 3 o'clock p. m. or as soon thereafter as the matter could be reached or words to that effect, the said defendant would take up said case-made to be signed and settled before the Honorable John Caruthers, Judge of said District, which motion was in writing and filed in said case with the clerk of said court; that said plaintiff has not filed any suggestions with counsel for said defendant George Washington; that on the morning of June the 30th, 1911, affiant, as one of the attorneys of said defendant, and for and on behalf of said defendant, affiant made three demands upon said Miller for said original case-made for the purpose of taking the same to the town of Okemah, and present the same to said district judge to settle and sign, in accordance with said notice and the order of said court made for preparing and settling said case-made, but said Miller positively refused to deliver to affiant said case-made, making as an excuse the first time that said Warren had gone to Tulsa and perhaps had said case-

made with him, and the second and third times refused to
53 deliver the same, unless so ordered by the court; that said Miller knew that the same was the original case-made in said cause and the same is so written on the face thereof.

H. S. SAMPLES.

Taken, subscribed and sworn to before me on this 30th day of June, 1911.

[SEAL.] RALPH P. WELCH.
Notary Public for said County and State.

My commission expires on the 21st day of Nov. 1912.

54 In the District Court of Hughes County, State of Oklahoma.

No. 801.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

To the above named plaintiff, Charles W. Miller, or Warren & Miller, his attorneys of record in said case:

Whereas you have failed and refused to return the original case-made in the above styled cause to the said defendant George Washington or his counsel of record herein so the same could be settled and signed by the judge of the Ninth Judicial District of the State of Oklahoma, and likewise have failed and refused to produce said case-made or appear, before said judge on the 30th day of June, 1911, as per notice heretofore given you as to the time and place and before whom said case-made was to be settled and signed by said judge:

You are hereby notified that at 8 o'clock A. M. on the 5th day of July, 1911, at his office in the town of Okemah, in Okfuskee County, State of Oklahoma, the above-named defendant, George Washington, will make a motion before the Honorable John Caruthers, the judge of said district, for a rule or order against you in said cause to show cause why you have failed and refused to so deliver said original case-made to said defendant for said judge at the time and place mentioned in the notice herein given for the settlement of said case made, and to show cause why such rule should not be given against you in said case requiring you to produce said case-made to and before said judge to have the same signed and settled, as required by law and the order of said court heretofore rendered in said case respecting the settlement of said case-made; and you are further notified hereby that in case the signing and settlement of said case-made is so delayed by your actions and conduct in this case that an appeal herein can not be perfected within the ten days required by law for appeals in matters of receivers that said defendant
55 will institute suit against you for damages arising for your misconduct in so defeating said appeal. This the 3rd day of July, 1911.

LAWSON & SAMPLES,
Counsel for said Defendant.

56 In the District Court of Hughes County, State of Oklahoma.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

Comes now the defendant, George Washington, in the above styled cause and moves the Court for a rule on the plaintiff Charles W. Miller, or Warren & Miller, his attorneys, to produce the original case-made in the above styled cause for the purpose of having the same settled and signed by the Judge of said Court.

LAWSON & SAMPLES,
Counsel for Defendant, George Washington.

57 In the District Court for Hughes County, State of Oklahoma.

CHARLES W. MILLER, Plaintiff.
vs.
GEORGE WASHINGTON et al., Defendants.

Bill of Exceptions.

The within cause coming on to be heard on this the 5th day of July 1911, and it appearing that the Court has heretofore made an order allowing three days to the defendant, George Washington, to make and serve case-made, two days after said service to the plaintiff to suggest amendments to be settled upon one day's notice by either party, and it appearing that the said order was made on the 26th day of June 1911, and that the case-made was served on the attorneys for the plaintiff on the 26th of June 1911, and that notice of settlement of said case was served on attorneys for plaintiff on the 28th day of June 1911, that the case would be presented to the Honorable John Caruthers, Judge of the Court for settlement on the 30th day of June 1911, at 3:00 o'clock P. M. and the said defendant, George Washington, appearing this day and asking for a rule on the attorneys for plaintiff to produce and deliver to attorneys for defendant, Washington, the case-made heretofore served upon them, which said rule is granted, and the said attorneys ordered to deliver said case-made to attorneys for defendant, Washington, to which order the said plaintiff excepts; and a settlement of the case being requested by the attorneys for the defendant, Washington, forthwith, which said settlement is objected to and protested against by the attorneys for the plaintiff, Charles W. Miller, the said objection and protest is by the Court overruled, to which the plaintiff, Charles W. Miller, excepts, and the request of the defendant Washington, for a settlement of the case is granted, to which the plaintiff excepts, and asks for a bill of exception to the action of the Judge in so ordering the production of the case-made

and settling the case, which said bill of exception is granted, and this his bill of exception is hereby signed and allowed.

JOHN CARUTHERS, *Judge.*

58 In the District Court of Hughes County, State of Oklahoma.

CHARLES W. MILLER, Plaintiff,
vs.
GEORGE WASHINGTON et al., Defendants.

Be it remembered, that on this 5th day of July 1911, at 10 o'clock A. M. at the Court house, in the City of Okemah, in the County of Okfuskee, State of Oklahoma, the above and foregoing case-made was presented to me, John Caruthers, Judge of the District Court of said county, before whom said cause was tried, to be settled and signed as the original case-made herein, as required by law, by the parties to said cause; and it appearing to me that said case-made has been duly made and served upon the plaintiff within the time fixed by the order of this court, and in the time and in the manner and form provided by law; that said plaintiff is present by his attorneys, Warren & Miller, and defendant George Washington by his attorneys, Lawson & Samples, and said plaintiff objected to the settlement of some because of lack of time for amendments and no proper notice of settlement, and said case-made, having been examined by me, is true and correct, and contains a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in said cause, I hereby allow, certify and sign the same as the true and correct case-made in said cause, and hereby order that the clerk of said court attest the same with his name and the seal of said court, and file the same of record, as provided by law.

Witness my hand, this 5th day of July, A. D. 1911.

JOHN CARUTHERS,
Judge of the District Court, Hughes County, State of Oklahoma.

District Court, County of Hughes, State of Oklahoma.

Filed Jul- 6, 1911.
T. E. NEAL,
District Clerk.
By —— ——, *Deputy.* [SEAL.]

Attest:

J. E. NEAL,
Clerk of District Court of Hughes County, State of Oklahoma.

Filed Jul- 6, 1911. W. H. L. Campbell, Clerk.

59 Endorsed on back of case-made as follows: In the Supreme Court of the State of Oklahoma. #2815. George Washington, Plaintiff in Error, vs.. Charles W. Miller, Defendant in Error. Petition in Error and Case-made. Lawson & Samples, Counsel for Plaintiff in Error. Warren & Miller, Counsel for Defendant in Error. Filed Jul- 6, 1911. W. H. L. Campbell, Clerk.

60 In the Supreme Court for the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Motion for an Extension of Time for — Brief.

Comes now the within defendant in error, Charles W. Miller, by his attorneys, Warren & Miller, and respectfully move for an extension of thirty days over and above the time allowed by the rules of this Court for filing brief of defendant in error, and this defendant in error states as his reason therefor that because of the brief of defendant in error being filed at the times of the vacations of the attorneys for defendant in error, that they will be unable to file full brief in time, unless extended.

Wherefore defendant in error prays for the allowance of the thirty days additional time as aforesaid.

Respectfully submitted,

WARREN & MILLER,
Attorneys for Defendant in Error.

Endorsed on the back as follows: No. 2815. George Washington, Plaintiff in Error vs. Charles W. Miller, Defendant in Error. Motion for extension of time for filing brief. Filed Sep. 6, 1911. W. H. L. Campbell, Clerk.

61 In the Supreme Court for the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Notice of Motion.

To Lawson & Sample, Attorneys for Plaintiff:

Please take notice that the defendant in Error herein has filed a motion in the above Court in the above entitled cause for an extension of time of thirty days in which to file brief for defendant in error.

WARREN & MILLER,
Attorneys for Defendant in Error.

STATE OF OKLAHOMA,
County of Hughes, ss:

Frank L. Warren, being first duly sworn on his oath states that on the 8th day of September 1911, at Holdenville, Oklahoma, he served a true copy of the foregoing notice on H. S. Samples, a member of the firm of Lawson & Sample, attorneys for plaintiff in error.

FRANK L. WARREN.

Subscribed and sworn to before me this the 8th day of September 1911.

[SEAL.] EDWARD R. NIX.
Notary Public.

My commission expires Feb. 10th, 1913.

Endorsed on back as follows: No. 2815. George Washington, Plaintiff in Error vs. Charles W. Miller, Defendant in Error. Proof of Service. Filed Sep. 11, 1911. W. H. L. Campbell, Clerk.

62 In the Supreme Court of the State of Oklahoma.

#2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

To Charles W. Miller, or to Warren & Miller, his Attorneys:

Take notice that on Monday the 11th day of September, 1911, the plaintiff in error in the above styled suit, will move the said Supreme Court to advance said cause upon the Docket of said court, upon a written motion to be filed therein, a copy of which is hereto attached.

This the 9th day of September, 1911.

LAWSON & SAMPLES.
Counsel for said Plaintiff in Error.

STATE OF OKLAHOMA,
County of Hughes, To wit:

H. S. Samples being first duly sworn, says that on the 9th day of September, 1911, he served the above notice and a copy of the motion therein mentioned, upon the defendant in error in person, by delivering copies of said notice and motion *with* him.

H. S. SAMPLES.

Taken, subscribed and sworn to before me on this the 9th day of September 1911.

[SEAL.] CHAS. RIDER.

My commission expires July 22, 19—.

Filed Sep. 13, 1911. W. H. L. Campbell, Clerk.

63 In the Supreme Court of the State of Oklahoma.

#2815.

GEORGE WASHINGTON, Plaintiff in Error,

vs.

CHARLES W. MILLER, Defendant in Error.

Comes now the plaintiff in error in the above styled suit and moves the court to advance said suit on the trial docket of said court, for the reason herein assigned and facts set forth herein.

This is a suit to quiet title, brought by the defendant in error, to 160 acres of land lying near Holdenville, Oklahoma, and were the allotment of Waitie Washington, deceased, and who died on the 2nd or 3d of November, 1907, leaving the plaintiff in error, his father, and a mother and half brothers and sister; that the defendant in error indirectly claims through the mother who was a full blood Creek and so enrolled, and by a succession of deeds set forth in the petition in error filed in this case and made a part of the brief of counsel for plaintiffs in error, and to which reference is here made for a fuller statement of the case, defendant in error claims said lands and is now in the possession thereof and receiving the rents and profits therefrom arising; that he placed two mortgages upon said lands aggregating about $1,800.00, and in one of which it is made a lien upon said rents also or provides the same are to be applied thereon; that the plaintiff in error claims a life estate in said lands as the heir of his child, Waitie Washington, and all the rents and profits therefrom arising, or to at least one half of the fee to said lands; that plaintiff in error answered the petition herein, setting forth all such matters therein, and asked the trial court to appoint a receiver herein, and upon motion for such receiver, the same was denied, whereupon the plaintiff in error proceeded to take an appeal therefrom and made and served a case-made herein within the ten days required by law, for such appeals, whereupon the defendant in error proceeded to defeat said appeal if possible by refusing to deliver up or return the original case-made so served upon him for

64 the purposes of said appeal, and still refused to appear on notice to settle said case-made or give up the same for such purposes, and thereupon the trial court was obliged to make, and did make, as shown by the record herein, an order upon the defendant in error compelling him to surrender up said case made for said purposes, and then signed and settled the same for this appeal and the purposes thereof, all of which is shown in the case-made hereof filed with this court, and to which and to our printed brief therein reference is here made.

Plaintiff in error pray- that because of such facts and the condition of such premises and the extreme uncertainty of the plaintiff being able to recover that present and past rents arising from said lands

from the defendant in error, that this cause be advanced upon the docket of this court and heard as speedily as possible.

Respectfully submited,

LAWSON & SAMPLES,
Counsel for Plaintiff in Error.

Filed Sept. 13, 1911. W. H. L. Campbell, Clerk.

65 In the Supreme Court of the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

On the 8th of September, 1911, the plaintiff in error was served with notice of a motion of defendant in error for an extension of time for filing a brief herein, a copy of which is hereto attached.

The plaintiff in error objects to any extension of time for such purposes, for the following reasons:

The court will observe from the record that the answer of the plaintiff in error was filed in said cause on the 14th day of May, 1911, and on the 16th or 17th of said month, the defendant in error dashed into court which at the time happened to be in session, and moved for judgment on the pleadings, although the case was not on docket for trial, and had been brought only a few days before this time; the court then entered up its judgment on the 26th of said month, and the plaintiff in error promptly proceeded to take the appeal to this court, as it became necessary to appeal within ten days on the order refusing to appoint a receiver herein; the case-made was duly made out and served upon the defendant in error within three days of said judgment, whereupon the defendant in error personally and as his own attorney in the case, set about to defeat this appeal if possible, and to harrass and annoy the plaintiff in error as much as possible, by refusing to return the original case-made so served upon them, or permitting him to have the same for the purpose of presenting the same to the trial court for settlement and did not appear at Okemah on the day the case was to have been settled; whereupon the plaintiff in error had to give another notice to require them to produce said case-made for such purposes and make another trip back to Okemah for such purposes whereupon defendant in error still refused to give up the case-made, and the trial judge then had to issue his orders compelling them to give it up for said purposes of appeal, and not until the same was

66 done was the plaintiff in error able to get his appeal, all of which appears in the case-made herein filed and to which the plaintiff in error here refers, as a just and proper reason why this motion should not be granted. In my humble judgment the defendant in error and counsel, (including himself as such) are in contempt of court by reason of such conduct, and therefore are not in a position to ask any favor of this or another court, as to matters

involved in this case, nor do they deserve any leniency whatever at the hands of this court or the plaintiff in error because of their misconduct in this case.

We also refer the court to our printed brief filed in this case for reference not only to such misconduct in this particular cause, but likewise to other cases being brought to this court on appeal, showing that it has become a fixed purpose of these same parties to thus defeat any appeal if possible and to annoy the applicant for appeal as much as possible and thus defeat the ends of justice if possible. Any one of experience knows that it requires far less time to answer a brief than to write the original; and if the party idles his time away during the 30 days allowed him, he has no right to pray upon the mercy of this court or the rights of the party whose appeal he has done his utmost to defeat by such misconduct.

It is our opinion, as shown by our printed brief, that this plaintiff in error is entitled to a life estate in said lands in controversy, or at the least an undivided one half interest therein, but this defendant in error is in the possession thereof, and the record shows he is indebted to the amount of at least $1800.00 for which there is a mortgage placed on said lands by him. He is hereby consuming all the rents and reaping all benefits; and it is fair to presume even from the face of this record that if he can not pay the $1800.00 he would not be liable to be responsible for these rents. An extension of 30 days would put the case practically over the time of gathering the rents. Besides, they are not entitled because of past conduct in this case to any courtesies, leniency or favors of this court
67 or the plaintiff in Error.

For the reasons herein assigned we ask that said defendant be refused any extension of time in this case; but on the other hand that the same be advanced on the docket and decided as quickly as possible.

Respectfully submitted,

LAWSON & SAMPLES,
Counsel for Plaintiff in Error.

Filed Sept. 13, 1911. W. H. L. Campbell, Clerk.

68 In the Supreme Court for the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Notice of Motion.

To Lawson & Sample, Attorneys for Plaintiff:

Please take notice that the defendant in error herein has filed a motion in the above Court in the above entitled cause for an extension of time of thirty days in which to file brief for defendant in error.

WARREN & MILLER,
Attorneys for Defendant in Error.

STATE OF OKLAHOMA,
County of Hughes, ss:

Frank L. Warren, being first duly sworn on his oath states that on the 8th day of September, 1911, at Holdenville, Oklahoma, he served a true copy of the foregoing notice on —— ——, a member of the firm of Lawson & Sample, Attorneys for plaintiff in error.

—— ——.

Subscribed and sworn to before me this the 8th day of September, 1911.

——— ———,
Notary Public.

My commission Expires —— —, ——.

Endorsed on the back as follows: 2815. Motion to advance and Obj. to def't's Mo. for ext. of time. Filed Sep. 13, 1911. W. H. L. Campbell, Clerk.

69 And thereafter, to-wit, on the 11th day of September, 1911, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause.

Supreme Court, July Term, 1911, September 11th, 1911, Ninth Judicial Day.

#2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

And now on this day in open Court, it is ordered by the Court that the motion of defendant in error for 30 days additional time to file briefs, be, and the same is hereby allowed.

70 Filed Sep. 21, 1911. W. H. L. Campbell, Clerk.

In the Supreme Court of Oklahoma.

No. 2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Response to Motion to Advance.

Defendant in error does not desire to resist the motion to advance this cause and files this response merely to challenge the accuracy of the statements contained in the motion.

The grounds for the appointment of a receiver were so absurd and unfounded that the trial court did not hesitate to deny it.

The order of the Court limited defendant in error to two days in which to suggest amendments when the statute provides for three. We believed we were entitled to the time provided by statute.

Another matter about which counsel for plaintiff in error complains is purely a matter of procedure in serving a case-made and perfecting appeals. We would be glad to have this passed upon at an early date as well as the other matters involved. This question is raised in good faith in this and in prior cases and is briefed fully.

We would be glad to have an early decision in this case, and in all the other cases we have on appeal, and do not resist the motion but we fail to see wherein plaintiff in error has cited a single meritorious reason for its advancement.

Respectfully submitted,

WARREN & MILLER,
Counsel for Defendant in Error.

71 And thereafter, to-wit, on the 26th day of September, 1911, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1911, September 28th, 1911.
Eighth Judicial Day.

#2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

And now on this day the above cause comes on for hearing by the court upon the motion to advance the above cause on the docket of this court, and the court having considered the same finds, that said motion to advance should be sustained, and it is so ordered.

72 And thereafter, to-wit, on the 26th day of September, 1911, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1911, September 26th, 1911,
Eighth Judicial Day.

#2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

And now on this day it is ordered by the Court that the motion of defendant in error herein for 30 days additional time to file briefs, be, and the same is hereby allowed.

73 And thereafter, to-wit, on the 14th day of November, 1911, in the Supreme Court of the State of Oklahoma, the followings proceedings were had in said cause:

Supreme Court, November Term, 1911, November 14th, 1911, First Judicial Day.

#2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

And now on this day the above cause is submitted on the record and briefs filed herein.

74 In the Supreme Court of Oklahoma.

No. 2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Motion to Dismiss.

The defendant in error, Charles W. Miller, respectfully moves that the proceeding in error in the above styled action be dismissed for the following reasons, to-wit:

1st. Cissie Cosar and Lillie Cosar, defendants below, are necessary parties to the proceeding in error in this Court, and will be affected by the judgment herein, and are not made parties in error, either plaintiff or defendant.

2nd. The Court below unduly limited the time for suggesting amendments to the case-made.

3rd. No notice of the settlement of the case-made was given.

4th. The case-made was not served on defendant in error in the manner required by law.

Respectfully submitted.

WARREN & MILLER,
Attorneys for Defendant in Error.

75 In the Supreme Court of Oklahoma.

No. 2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Notice.

To George Washington, or his attorney of record, Lewis C. Lawson:

You are hereby notified that on Saturday, December 16th, 1911, at 10 o'clock A. M. the defendant in error will move the dismissal of the proceedings in error in the above entitled cause.

WARREN & MILLER,
Attorneys for Defendant in Error.

Frank L. Warren being first duly sworn, on his oath states that he served the foregoing notice by delivering a copy thereof to Lewis C. Lawson on the 13th day of December, 1911.

FRANK L. WARREN.

Subscribed and sworn to before me this 13th day of December, 1911.

[SEAL.] EDWARD R. NIX,
Notary Public.

My commission expires Feb. 10th, 1913.

Endorsed on back: No. 2815. George Washington, pl'ff in error, vs. Charles W. Miller, Def't in Error. Motion to dismiss. Filed Dec. 14, 1911. W. H. L. Campbell, Clerk.

76 In the Supreme Court of the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Comes now the above named plaintiff in error and states that on the 13th day of December, 1911, he was served with a notice of which a copy is hereto attached as exhibit "A", at about half past 7 o'clock in the evening, to the effect that the defendant in error would move this court to dismiss said appeal on the 16th day of said month; that, said copy above referred to is all the notice, paper or instrument of any kind which has ever been served upon said plaintiff in error; and the same does not give plaintiff in error any notice whatever of the nature or character of said motion other than simply that it will be for a dismissal thereof but does not state, nor does said plaintiff in error know, what grounds therefor is or will

be assigned for such dismissal, and the same does not conform to the rules of this court in like matters.

Plaintiff in error, therefore prays that such motion be denied and that before any hearing thereon be given that plaintiff in error be given proper notice thereof and a copy of such motion that he may be informed of the nature and character thereof so that he may answer the same if needs be.

LEWIS C. LAWSON.

STATE OF OKLAHOMA,
County of Hughes, To wit:

Lewis C. Lawson, being duly sworn says that he is of counsel for the above named plaintiff in error; that he knows the contents of the foregoing statement; that he received said notice of said motion but nothing else and was not served with a copy of such motion and has no knowledge whatever of the ground of said motion other than what is stated on said copy.

LEWIS C. LAWSON.

Taken, subscribed and sworn to before me on this the 15th day of December 1911.

O. S. RIOES,
Justice of the Peace in and for Holdenville City, Hughes County, Oklahoma.

77 In the Supreme Court of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Notice.

To George Washington, or his attorney of record; Lewis C. Lawson:

You are hereby notified that on Saturday, December 16th, 1911, at 10 o'clock A. M. the defendant in error will move the dismissal of the proceedings in error in the above entitled cause.

WARREN & MILLER,
Attorneys for Defendant in Error.

Endorsed on the back: No. 2815, George Washington, Plaintiff in Error, vs. Charles W. Miller, Defendant in Error. Request denied. Robertson C. Filed Dec. 16, 1911. W. H. L. Campbell, Clerk.

78 In the Supreme Court of the State of Oklahoma.

No. 2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

Comes now the plaintiff in error and moves the court to strike from the record in said case in said court the motion therein of said defendant in error to dismiss the appeal therein, for the reason that said plaintiff in error was not served with a copy of said motion, or given any notice or knowledge of the contents or grounds of said motion.

LEWIS C. LAWSON,
Counsel for said Plaintiff in Error.

79 In the Supreme Court of the State of Oklahoma.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

To said Charles W. Miller:

Take notice that on the 20th day of December, 1911, the above named plaintiff in error will move the said Supreme Court to strike from the record in said case your motion to dismiss said action in said court for reason shown by a copy thereof herewith served, as a part hereof.

This the 19th day of December, 1911.

LEWIS C. LAWSON,
Counsel for said Plaintiff in Error.

STATE OF OKLAHOMA,
County of Hughes, To wit:

James A. Long being duly sworn says that on the 19th day of December, 1911, he served the above notice and a copy of the motion therein referred to by delivering the same to said Charles W. Miller in person.

JAMES A. LONG.

Taken, subscribed and sworn to before me on this the 19th of December, 1911.

O. H. RIOES,
Justice of the Peace in and for Holdenville Township, Hughes County, Oklahoma.

Endorsed on back as follows: 2815. Denied, Robertson C. Filed Dec. 21, 1911. W. H. L. Campbell, Clerk.

80 And thereafter, to-wit, on the 9th day of January, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, January Term, 1912, January 9th, 1912, First Judicial Day.

#2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

And now on this day it is ordered by the court that the motion filed herein to strike the motion of defendant in error to dismiss the above appeal, be, and the same is hereby overruled; it is further ordered that the motion to dismiss be overruled.

81 And thereafter, to-wit, on the 9th day of January, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, January Term, 1912, January 9th, 1912, First Judicial Day.

#2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the lower court in the above cause, be, and the same is hereby affirmed. Opinion by Robertson, C.

By the COURT: It is so ordered, the above opinion is hereby adopted in whole, and judgment is entered accordingly.

82 In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division No. One.

Filed Jan. 9, 1912.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

No. 2815.

Syllabus.

1. George Washington, a full blood Seminole Indian, married, Cissie, a full blood Creek Indian, in 1893, to whom was born four children, two of whom died in infancy, before allotment, the third in 1901, while the fourth, Waitie Washington, died November 3d, 1907, an unmarried minor, without children or descendants of children. Prior to Waitie's death, his mother separated from his father, George Washington, and took up with Mack Cosar, by whom she had one child, Lillie Cosar. After the separation George Washington remarried, and by the latter marriage had three children, who with Lillie Cosar are half brothers and sisters of Waitie Washington. In July, 1909, Cissie Cosar sold the allotment of her said son, Waitie Washington, to Frank L. Warren, by warranty deed, said sale being duly approved by the County Court of Hughes County. Warren's grantee brought suit to quiet title against George Washington. Held,

First. Under these facts George Washington did not inherit any estate in and to his son's allotment.

Second. Section 6 of the Supplemental Creek Agreement, approved June 30, 1902, was in force and effect at the time the descent was cast in this case, to-wit: November 3, 1907, and the terms thereof controlled in the devolution of said estate. 32 Stat. L. 500, Approved June 30, 1902.

Third. Section 2 of the Act of Congress entitled, "An Act to provide for additional U. S. judges in the Indian Territory, and for other purposes" approved April 28, 1904 did not repeal, by implication, or otherwise, Section 6 of the said Supplemental Creek Agreement.

83 Error from the District Court of Hughes County.

JOHN CARUTHERS, *Judge.*

Action by Charles W. Miller, against George Washington, et al., to quiet title to real estate. Judgment for plaintiff. Defendant, George Washington, brings error.

Affirmed.

Charles W. Miller, the defendant in error, plaintiff, below, brought suit against George Washington, plaintiff in error, defendant below, and Cissie Cosar, and Lillie Cosar to quiet title to one hundred sixty acres of land, situated in Hughes County, Oklahoma. It appears from the record that George Washington, a full blood Seminole Indian, and enrolled as such, and she who is now Cissie Cosar, who is a full blood Creek Indian, and enrolled as such, were married in 1893. Four children were born to them, two of whom died in infancy before enrollment, the third in 1901, and Waitie, the fourth on November 3, 1907, prior to statehood, he being an unmarried minor at the time of his death, and without children or descendants of children. The land in controversy is the allotment of Waitie Washington. The record further shows that Cissie, the mother of Waitie lived with plaintiff in error, George Washington for about ten years, when they separated, she taking up with one Mack Cosar, and by whom she had one child, Lillie Cosar, who is also a defendant in the action below, but not a party to this action in this court. George Washington, after his separation from Cissie, the mother of Waitie Washington, remarried, and by his second wife had three children, who with Lillie Cosar are half brothers and sisters of said Waitie Washington. Cissie Cosar, on July 16, 1909, sold and conveyed by general warranty deed, duly approved by the County Court of Hughes County, the land in question to one Frank L.
84 Warran, who later sold the same to Oscar S. Penny, whose administrator sold it to the First National Bank of Holdenville, which later conveyed it to this defendant in error, who filed his petition to quiet title on May 15, 1911, and on June 14, 1911, plaintiff in error filed his answer, in which he says:

"George Washington, defendant, desiring to facilitate this cause as rapidly as possible, hereby waives the signature of plaintiff or his counsel herein, to the petition, and likewise all grounds of demurrer thereto, and for his answer to said petition herein filed, denies, etc., etc." (Record p. 5.)

So that any defect there may have been in the petition by the answer on the part of plaintiff in error has been waived and no further consideration will be given the assignment of error in which the sufficiency of the petition is complained of. In his answer George Washington sets up all the facts hereinbefore enumerated, and admits possession in the defendant in error. Defendant in error, on the filing of this answer by George Washington, but before answer, plea, appearance or default of either of the other defendants, filed his motion for judgment on the pleadings, as against George Washington only, and the court of consideration thereof sustained the same and entered a decree in favor of the defendant in error and against the plaintiff in error, quieting the title to said land in said defendant in error, Charles W. Miller. No attempt was made, at the time, to adjudicate any questions in this case as between defendant in error and Cissie Cosar and Lillie Cosar, and no reference was made to them directly or indirectly in the decree entered by the court. From this judgment plaintiff in error appeals.

Lawson & Semple, for Plaintiff in Error.

Warren & Miller, for Defendant in Error.

ROBERTSON, *C.* (after stating facts above):

There is but one question in this case, viz: Did George
85 Washington, a full blood Seminole, and the father of Waitie Washington, whose mother was a full blood Creek, under the admitted facts of the pleadings herein, inherit any estate or interest in the allotment of Waitie Washington? We think the question must be answered in the negative. Section 6 of the Supplemental Creek Agreement, 32 Stat. at L. page 500, ratified June 30, 1902, was in force at the time the descent was cast in this case, to-wit: November 3d, 1907; said section reads as follows; to-wit:

"SECTION 6. The provisions of the act of Congress approved March 1, 1901, (31 Stat. L. 861) insofar as they provide for descent and distribution, according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in the Indian Territory; Provided, That only citizens of the Creek Nation, male and female and their Creek descendants, shall inherit lands of the Creek Nation; and provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non citizen heirs in the order named in said chapter 49."

Counsel for plaintiff in error admit that said section is controlling, of the question under discussion, provided the same is not repealed or nullified by the Act of Congress, April 28, 1904, entitled, "An Act providing for additional judges in the Indian Territory, and for other purposes," section 2 of which reads as follows:

"SEC. 2. All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory whether Indian, Freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, Freedmen or otherwise. That the sum of twenty thousand dollars is hereby appropriated out of any money in the treasury not otherwise appropriated, for the payment of salaries of the judges hereby authorized, the same to be immediately available."

86 In an able and exhaustive brief, which gives in an interesting and instructive manner a complete resumé of the various enactments on this particular subject in the Indian Territory since 1890, plaintiff in error contends that the last mentioned Act of Congress repeals Section 6 of the Supplemental Creek Treaty, supra. We can not concur in this opinion. There is no repealing clause attached to the Act of April 28, 1904, and if the said section 6 was repealed it would be by implication, and the law does not look with favor upon such repeals. Then too, the act of April 28, 1904, is a general act, while the Supplemental Creek agreement of June 30, 1902, is a special act and nothing in the general act can work as repeal of the special act unless the language used, and the objects and purposes, intended, permits of no other conclusion. We fully

agree with counsel that where two statutes are so repugnant to each other that they can not stand or be construed together, the first in point of time is repealed by the last, if not expressly, then by necessary implication. But we do not agree that there is such conflict or repugnancy between these two acts. The intent of the lawmaker is to be deduced and gathered from the whole statute and by a comparison of other statutes, pari materi.

We must also concede the soundness of the proposition laid down in District of Columbia vs. Hutton, 143 U. S. 18; 36 Law Ed. 60.

"Where two acts are repugnant in any of their procisions, the later Act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first. Where two acts are not in express terms repugnant, yet if the later Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first Act, it will operate as a repeal of that Act."

87 But a careful examination of these statutes fails to show any such conflict or repugnancy as would warrant us in saying that a repeal by implication of Section 6 of the Supplemental Creek Agreement, supra, was had. On the contrary, the conflict between the two is largely a creature of the imagination, as an examination of those statutes will readily disclose. The Act of April 28, 1904, was evidently passed for the sole purpose of taking from the tribal courts their criminal, civil, and probate jurisdiction and vesting it in the U. S. Courts of the Indian Territory, and by Section 2, especially to set at rest all doubts as to whether or not U. S. Courts could and did have, probate jurisdiction, and the act also provided additional facilities in the matter of extra judges and court towns. There was no attempt to provide by said act a new law of descent and distribution. There is nothing in the act that will warrant such an inference or justify such a conclusion. The *action* of the Act of April 28, 1904, complained of reads as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estate in said Territory, whether Indian Freedmen or otherwise."

This part of said section does not repeal any law in force in the Indian Territory except those acts which excluded certain persons and estates from the operation of the law of Arkansas (and the tribal laws did so to a certain extent), making their misdemeanors, and certain felonies, punishable by the U. S. laws (which were the Arkansas laws), and bringing their estates within the scope of the Arkansas laws for probate purposes. Certainly no other construction can be given to that part of section 2, while the balance

88 of said section deals with the jurisdiction of the Indian Territory courts as witness:

"And full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlement of all estates of decedents, in guardianship of minors, and incompetents, whether Indian Freedmen or otherwise."

This gave to the U. S. Courts probate jurisdiction in all those enu-

merated classes of cases, in some of which jurisdiction had not theretofore been exercised. And as is well said by counsel for defendant in error in his brief,

"It also set at rest any doubt which there might be of a U S. court having such jurisdiction."

Certainly there is no repeal of Section 6 of the Supplemental Creek Treaty in this section. This act of April 28, 1904, supra, put in force in the Indian Territory the laws of Arkansas, in certain classes of cases where certain tribal laws had theretofore controlled, but did not in any manner effect the provisions of the special act known as the Supplemental Creek Treaty, of June 30, 1902. To hold that it did would also in like effect hold that it would repeal all the restrictions upon alienation of Indian Lands; the provisions for special U. S. Courts; all tribal tax laws; all laws forbidding taxing of Indian lands, etc., indeed, very few, if any U. S. Laws would be left in force in the Indian Territory, for as counsel contends, only such laws would be in force as had theretofore been put in force from the Statutes of Arkansas. We do not deem further consideration of this subject necessary. Undoubtedly the devolution of the land embraced in this controversy is controlled by Section 6 of the Supplemental Creek Treaty, supra, and such being the case it is plainly apparent that the plaintiff, George Washington the full blood Seminole father of Waitie Washington, a half
89 blood Creek, did not inherit any interest in his allotment and therefore, the judgment of the District Court of Hughes County should be affirmed.

January 9, 1912.

By the COURT: Adopted in whole.

90 And thereafter, to-wit, on the 24th day of January, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court Proceedings.

#2815.

GEO. WASHINGTON, Plaintiff in Error,
vs.
CHAS. W. MILLER, Defendant in Error.

And now on this Jan. 24 1912 it is ordered by the Court that the mandate of this court in the above cause be, and the same is hereby stayed.

91 And thereafter, to-wit, on the 25th day of June, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, May Term, 1912, June 25th, 1912, Sixteenth Judicial Day.

#2815.

GEORGE WASHINGTON, Plaintiff in Error,
vs.
CHARLES W. MILLER, Defendant in Error.

And now on this day it is ordered by the court that the petition filed herein for rehearing in the above cause, be, and the same is hereby denied.

92 In the Supreme Court of the State of Oklahoma.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 91 pages, numbered from 1 to 91, both inclusive, are a full, true and complete transcript of the record and all proceedings in the Supreme Court except the petition for rehearing and response, in cause No. 2815, George Washington, Plaintiff in error, versus Charles W. Miller, Defendant in error, as the same remain on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, this 15" day of August, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma.
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 23,342. Oklahoma Supreme Court, Term No. 336. George Washington, Plaintiff in error, vs. Charles W. Miller. Filed August 28th, 1912. File No. 23,342.

[redacted]

Supreme Court of the United States

[redacted]

GEORGE WASHINGTON, [redacted]

vs.

CHARLES W. HEAR, [redacted]

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Brief on Behalf of Plaintiff in Error

[redacted]

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In the

SUPREME COURT OF THE UNITED STATES,

October Term, 1914.

No. 336.

GEORGE WASHINGTON, - - *Plaintiff in Error,*

vs.

CHARLES W. MILLER, - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT *of the* CASE

The facts in this case, as also presented in the Petition in Error in said State Supreme Court, are as follows:

That on the 15th day of May, 1911, the defendant in error filed a suit in the District Court of Hughes County, State of Oklahoma, against this plaintiff in error, Sissie Cosar, and Lillian Cosar, an infant, to quiet the title to 160 acres of land situated in said County (page 13 of the record); to which plaintiff in error answered, first, by a general denial, and then by way of affirmative relief, where-

in he alleged: that said defendant in error claimed some interest in said lands by reason of a deed obtained from said Sissie Cosar by one Frank L. Warren, dated the 16th of July, 1909, and on said date transferred by said Warren to one W. J. Smith, now deceased; that afterwards, one Oscar S. Penny, as the administrator of said Smith's estate, transferred said lands to the First National Bank; and on the 26th of January, 1910, said bank pretended to make said Warren another deed for said lands, and on the same day said Warren deeded the same to said defendant in error, who gave two mortgages thereon for about $1800.00 to different parties; that the lands were allotments of one Waitie Washington, who was the son of this plaintiff in error and said Sissie Cosar, and who died on the 3rd day of November, 1907, leaving him surviving said Sissie, his mother, this plaintiff in error; said Lillian Cosar, a half-sister, and three other half-brothers and sisters; that plaintiff in error and said Sissie were married about the year 1883, and lived together in the Creek Nation about ten years, and of said marriage there were four children born, two of whom died before allotments of said nation, one in 1901, and said Waitie in November, 1907, as aforesaid; that said Sissie left plaintiff in error about 1893 and took up with one Mack Cosar, by whom said Lillian was born; and plaintiff in error also again married and had three children by his second wife, all of whom are still living; that said land in contro-

versy was the allotment of said Waitie, who died in the possession thereof; that in said answer, plaintiff in error further set up that he was the owner of either a life estate in said lands or an undivided one-half interest therein in fee simple; and asked that said lands be placed in the hands of a receiver until such matters could be heard and fully determined; that said answer appears on pages 14, 15, 16, 17 and 18 of the record, and a copy of said mortgages therewith filed as exhibits may be seen on pages 18, 19, 20, 21 and 22; and said deed of plaintiff in error to said Warren may be seen on pages 22 and 23 of the record; that on the 16th day of June, 1911, said defendant in error filed his motion in said case for judgment on the pleadings against the plaintiff in error for the relief prayed for in his petition, and for his reasons therefor stated that the answer of plaintiff in error filed herein affirmatively shows that the plaintiff in error had no defease to this action and that said plaintiff below was entitled to the relief sought against him (page 25 of the record); that said motion was taken under advisement by the trial court on said date (page 25 of the record); and on the 26th day of June, 1911, said court sustained said motion, holding that said Miller was the owner and in possession of said lands, and decreed against the plaintiff in error for costs; that on said date, to-wit, 26th of June, 1911, plaintiff in error filed his motion for a new trial therein (page 26), which motion was overruled by

said court on said date and duly excepted to by plaintiff in error; whereupon plaintiff in error appealed said case to the Supreme Court of said state (pages 27 and 28 of the record); that on the 9th day of January, 1912, said court made and entered up its decision, whereby said judgment of said District Court was affirmed, as shown on pages 46, 47, 48, 49 and 50 of the record; that thereupon the plaintiff in error filed his petition for a rehearing, but said Supreme Court, on the 25th of June, 1912, denied said motion for a rehearing, as shown on pages 50 and 51 of the record; whereupon plaintiff in error sued out this writ of error from this court to said Supreme Court.

SPECIFICATION *of* ERRORS

Plaintiff in error presents the following errors of said Supreme Court, as so decided against him in said proceedings:

First

That the said Supreme Court erred in holding and deciding that said lands in controversy belong to said Charles W. Miller and that said plaintiff in error had no right, title, interest or estate in or to said lands, without making or requiring to be made as parties thereto the said Frank L. Warren, Union Central Life Insurance Company, L. U. Humphrey and L. L. Humprhey, as prayed for by said plaintiff in error in his said answer; in which said decision and holding, as aforesaid, there was drawn in question and necessarily decided Section 1 of the Fourteenth Amendment of the Constitution of the United States, which declares that, "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and that said decision and holding is repugnant to and in conflict with said section of said Fourteenth Amendment and deprives the plaintiff in error of his right, title, in-

terest and estate in and to said lands, without due process of law, and denies the said plaintiff the equal protection of the laws, as made and provided in said section.

Second

That the said court erred in holding that under the facts presented in the record and proceedings in this case the plaintiff in error, George Washington, did not inherit any estate in and to the said allotment of the said Waitie Washington, deceased.

Third

That said court erred in holding and deciding that Section 6 of the Supplemental Creek Agreement, approved June 30, 1902, was in force and effect at the time the descent was cast in this case, to-wit, November 3, 1907, and the terms thereof controlled in the devolution of said estate.

Fourth

That said court erred in holding and deciding that Section 2 of the Act of Congress entitled, "An Act to Provide for Additional United States Judges in the Indian Territory, and for Other Purposes," approved April 28, 1904, did not repeal, by implication or otherwise, Section 6 of said Supplemental Creek Agreement.

Further Errors, Facts, Laws and Acts of Congress Shown in Assignment of Errors.

Plaintiff in error says that in the aforesaid suit there was drawn in question the aforesaid Acts of Congress of the United States and the legal force and effect thereof, wherein it was maintained by said plaintiff in error that the provisions of said Act of Congress, approved on the 28th day of April, 1904, mentioned in said answer and decision, repealed Section 6 of said Supplemental Creek Agreement, and thereby changed the law of descent throughout Indian Territory, so that Chapter 49 of the Statutes of Arkansas, as shown in Mansfield's Digest of 1884, thereby became the law of descent which governed the final disposition of the lands in controversy; and under which said chapter the plaintiff in error became entitled to at least a life estate in and to said lands, to endure during his natural life; that upon his death the mother, Sissy Cosar, if then living, became entitled to a life estate in said lands, with the fee simple title thereto in the said children of the plaintiff in error living at the time of the death of Waitie Washington.

Plaintiff in error further contends that even though it should be ascertained and determined that said Act of Congress of April 28, 1904, did not repeal said Section 6 of said Supplemental Creek Agreement, still said plaintiff in error took a life estate in said lands upon the death of said Waitie

Washington, under and by right of said Chapter 49 of the Statutes of Arkansas so put in force in said Creek Nation by said Section 6 of said Supplemental Creek Agreement; and that the provisos provided for in said Section 6 are not repugnant to a life estate in said lands to this plaintiff in error, but the same are consistent with such life estate; but that said Supreme Court, in so holding and deciding said cause, denied the validity of said Act of April 28, 1904, wherein it repealed said Section 6; and also denied the validity of said Section 6 as applicable to the life estate of this plaintiff in error in and to said lands; and denied to this plaintiff in error all his right, title, interest and estate in and to said lands arising under and by virtue of said respective Acts of Congress of the United States; and that said respective acts and sections thereof were directly in controversy in this suit, and the rights and interests of this plaintiff in error were dependent upon the proper legal construction of the same, and that such construction and decision was against the validity of said acts, as above indicated, and against the rights and interests of the plaintiff as guaranteed to the plaintiff in error under and by reason of said several acts and their proper legal construction; and that said Supreme Court of the State of Oklahoma is the highest court of said state in which a decision in this suit could be had.

PLEADINGS IN SAID CASE

Petition in said District Court is as follows:

In the District Court of Hughes County, Oklahoma. Charles W. Miller, Plaintiff, v. George Washingson, Sissie Cosar and Lillie Cosar, Defendants.—No. 801.

Petition.

Comes the plaintiff herein, Charles W. Miller, and states that he is a resident of Hughes County, Oklahoma; that the defendants, Sissie Cosar and Lillie Cosar, are residents of Hughes County, Oklahoma; that the defendant, George Washington, is a resident of Seminole County, Oklahoma, and that the land which is the subject matter of this action is situated in Hughes County, Oklahoma, and for cause of action herein, states:

That the said plaintiff is the owner of the legal and equitable estate in the Southeast Quarter of Section Thirty-Six (36), Township Eight (8) North, and Range Eight (8) East, and that he is in possession of the same; that the defendants, George Washington, Sissie Cosar and Lillie Cosar, claim some estate or interest in and to said land; that the said defendants have no right, title, estate or interest in and to said land and that their claim of same is a cloud upon the title of this plaintiff; that the defendant, Lillie Cosar, is a minor of the age of thirteen years.

Wherefore, plaintiff, Charles W. Miller, prays that a guardian *ad litem* be appointed for the said infant, Lillie Cosar; that the court decree that the said George Washington, Sissie Cosar and Lillie Cosar have no estate or interest in and to the land above described, and that they be perpetually enjoined from asserting any right, title or claim to same, and that the court further decree that the said plaintiff is the owner of said land and that the title to same be quieted in him, and for all proper relief.

WARREN & MILLER,
Attorneys for Plaintiff.

Charles W. Miller, Plaintiff, v. *George Washington, et al., Defendants.*—No. 801.

Answer of Plaintiff in Error.

Comes now the defendant, George Washington, and desiring to facilitate this cause as rapidly as possible, hereby waives the signature of the plaintiff or his counsel herein to the petition, and likewise all grounds of demurrer thereto, and for his answer to the said petition herein filed, denies each and every charge, statement and allegation made and contained in said petition except that the defendant is claiming an interest in the land mentioned and described in said petition, and as to that charge says that the same is true and defendant does claim an estate right and interest in said lands as hereinafter set forth:

Second —

And for further answer herein and by way of affirmative matters herein this defendant charges and avers:

That this defendant is a full-blood Seminole Indian and so enrolled upon the rolls of the Seminole Nation of Indians of the Indian Territory; that his roll number thereon is 413; that he is now fifty-two years old; that he has always lived and resided in said Nation and in the Creek Nation of said Territory; that defendant, Sissie Cosar, is a full-blood Creek citizen and so enrolled upon the Creek rolls of said Creek Nation; that about the year eighteen hundred and eighty-three (1883), this defendant and said Sissie Cosar were married to each other in said Creek Nation, and thereafter lived, resided and cohabitated together as husband and wife for a period of about ten years, or until about the year 1893; that defendant and said Sissie were living and cohabitating together as husband and wife on the 2nd day of May, 1890, and for many years prior and subsequent thereto; that of said marriage between defendant and said Sissie, as aforesaid, there were four children born to defendant and said Sissie, during the time they so lived and cohabitated together as husband and wife; that the oldest child was named Gibson Washington and died before enrollment; that the second child died when but three days old, un-named; that the

third child was named Willie Washington, and died, after enrollment, about the month of ——, 1901, intestate and an infant; that the fourth child was named Waitie Washington, and died, intestate, and an infant, on or about the 2nd or 3rd day of November, 1907, leaving him surviving this defendant as his father, said Sissie Cosar as his mother, and said Lillian Cosar, an half sister on the part of his mother, and three other children on the part of defendant, named Widie Washington, Willie Washington and Lena Washington, who are half brothers and sisters of said Waitie Washington but are Seminoles; that after the birth of said first four named children, said Sissie left this defendant and claimed to have procured a divorce from defendant, and then took up with said Mack Cosar, with whom she is now living; whereupon this defendant married his present wife, Hepsey Washington, and by her, said defendant had said three children, Wadie, Willie and Lena Washington, all of whom are still living;

Third —

That said Waitie Washington was a minor at the time of his death, and was unmarried and left no children or descendants of any child or children, surviving him at the time of his death; that said Waitie was enrolled as a full-blood Creek citizen, and his roll number was 5494; that he was duly

enrolled on the 7th day of March, 1900; and that the lands in controversy in this suit was the allotment made and assigned to said Waitie Washington as his proportional part of the Creek Nation, on the final allotment of said nation, and the same was so allotted and the patents therefor were issued and recorded and delivered, during the lifetime of said Waitie; that said lands were so allotted to said Waitie under and by virtue of an Act of Congress, entitled "An Act to Ratify and Confirm an Agreement With the Muskogee or Creek Tribe of Indians, and for Other Purposes," passed on the first day of March, 1901; and at the time of his death, said lands passed by the laws of descent then in force in said Indian Territory, which was chapter forty-nine of the Statutes of Arkansas, as compiled in Mansfield's Digest of 1884, put in force in said Territory by an Act of Congress, the last time, on the 28th day of April, 1904, by an act entitled, "An Act to Provide for Additional United States Judges in Indian Territory, and for Other Purposes;" and that said Chapter 49 had on several other times before the death of said Waitie Washington been put in force in said Territory, and was in full force and effect in said Territory at the time of his death as aforesaid, and the title to said lands passed to his heirs thereunder;

Fourth—

That on or about the 16th of July, 1909, said Sissie Cosar and said Mack Cosar pretended to make and execute to one Frank L. Warren a deed for said lands hereinbefore mentioned and described, and on the same day pretended to have the same approved by the County Court of said County of Hughes, and the same were placed of record in the office of the Register of Deeds of said county, in Deed Book, No. "B", on pages 579, etc.; that on the same day and date, said Warren pretended to convey the said lands to one W. J. Smith (now deceased), and recorded in said office in Deed Book No. 1, on page 531; that on the 21st day of December, 1909, one Oscar S. Penny, as the administrator of said Smith's estate, pretended to make and execute to the First National Bank of Holdenville, a deed for said lands, and the same was placed of record in said office in Deed Book No. 4, on page 259; that on the 26th day of January, 1910, said bank pretended to make and execute to said Warren another deed for said lands, and the same was placed of record in said office, in Deed Book No. 4, on page 349; that on the same last named date said Warren and wife pretended to make and execute to said Charles W. Miller, the plaintiff herein, another deed for said lands, and the same was placed of record in said office in Deed Book No. 3, on page 397; and that on the 27th day of July, 1907, said

Miller made and executed a mortgage upon said lands to secure to the Union Central Life Insurance Company, a corporation, of Cincinnati, Ohio, to secure it the sum of $1700.00, which said mortgage was likewise placed of record in Mortgage Book No. 5, on page 376; and on the same date, said Miller made another mortgage on said lands to L. U. Humphrey and L. L. Humphrey, of Independence, Kansas, to secure the sum of $85.00, and the same was also placed of record in said office in Mortgage Book No. 5, on page 400; a duly certified copy of said first mortgage is herewith filed as part hereof, marked exhibit "A"; and a duly certified copy of said second mortgage is herewith filed as exhibit "B"; and that on the 28th of April, 1911, this defendant was induced by said Warren to make and execute to him a deed of quit-claim to all his right, title and interest in and to said lands, by representing to defendant that he, defendant, had no right, title or interest in and to the said lands; that defendant went to said Warren & Miller, who are partners in the practice of law, for the purpose of obtaining advice as to the rights and interests of defendant in and to said lands, and was then and there informed by them that defendant had no rights or interest in said lands; whereupon defendant then and there started out of the said office of Warren & Miller, the said Miller being the plaintiff in this suit, and was called back by them and told that if defendant would sign the paper presented to him,

they would give defendant some money, and then and there offered defendant $25.00 to sign the same, but defendant refused to sign the same for said sum, whereupon said Warren & Miller offered defendant the sum of $30.00 to sign the same; and defendant thus being advised that he had no interest in said lands by said Warren & Miller, concluded to take said $30.00, and did so, thinking at the time he had no interest in said lands, and was so induced to think he had nothing therein by the advice of said Warren & Miller, to whom he thus went for legal advice as to said matters, and then and there signed some kind of a paper for them, which now seems to have turned out to be a deed for said lands, or his interest therein, which was placed of record in said office in Deed Book No. 8, page 40, a duly certified copy of which is herewith filed as part hereof, marked Exhibit "C"; that said paper above referred to is the only paper defendant ever signed for said Warren & Miller, or either of them, respecting said lands;

Fifth—

That defendant is now informed, and believes and so charges, that he was entitled to either an undivided one-half interest and estate in and to said lands in fee simple, or to an estate for life and to all of said lands, as an heir of the said Waitie Washington: that defendant did not know these facts at the time of so signing said pretended deed to said

Warren, dated the 28th day of April, 1911, but, as aforesaid, was induced, before signing the same by said Warren & Miller, to believe, and defendant did believe, that he had no interest therein, and being thus misled by such misrepresentations so made to him by said Warren & Miller, defendant accepted said $30.00 and made or executed said paper to said Warren as aforesaid; that said $30.00 was all the consideration which defendant ever got from said Warren for his interest in and to said lands, and the same is wholly inadequate consideration; that there is far more than one-half of said lands in actual cultivation, and all of said lands are situated within about one mile of the county seat of Hughes County, and said lands are easily worth $30.00 an acre at the least, and very valuable, and consists of 160 acres;

Sixth —

That defendant has always lived and resided among the Seminole and Creek citizens of said Indian Territory, and can neither speak nor understand the English language, and cannot converse in said language; that he has never been accustomed to the transactions of business of any great importance, and does not know much about such matters; that he is a full-blood Seminole Indian, and is so enrolled on the rolls of said Nation, and said pretended deed to said Warren for his interest in said land as shown by said Exhibit "C," is abso-

lutely null and void, and passed no right, title or interest in said lands, because the same was never approved by the Secretary of the Interior; nor was the same even approved by any County Court of said state, so far as defendant knows; that the same was thus procured from defendant under the misapprehension aforesaid that defendant really had no title thereto, and so induced to believe by said Warren & Miller, in the way and manner aforesaid, and thereby defendant was thus induced to so make said deed for said $30.00, as hereinbefore stated; that all of said children aforesaid who thus survived said Waitie Washington are still minors, and entitled to participate in the division of said lands in case defendant has only a life estate therein.

Defendant therefore prays that said Frank L. Warren, Union Central Life Insurance Company and said L. U. Humphrey and L. L. Humphrey be made parties defendants herein; that said pretended deed of defendant to said Warren be canceled and declared null, void and ineffectual, and fraudulent, and entirely set aside; that said two mortgages aforesaid be set aside and canceled as to the rights and interests of this defendant in and to said lands; that a receiver herein be appointed to take charge of said lands and collect the rents and profits arising therefrom until the termination of this suit and the rights of all persons herein be determined; that defendant be decreed either an un-

divided one-half interest in and to said lands in fee simple, or to a life estate in all of said lands for and during his own lifetime, and all the rents on said lands, etc., and such other, further and general relief herein as the nature of this case may require, or which to equity and good conscience may seem proper. And he will ever pray, etc.

GEO. WASHINGTON, *Defendant.*

LAWSON & SAMPLES,

Counsel for Said Defendant.

State of Oklahoma, County of Hughes, to-wit:

George Washington, being first duly sworn, says that he is the defendant named in the foregoing answer; that he knows the contents thereof, the same having been carefully read over to him in Creek and explained to him in said language; and that the statements, facts and allegations therein contained are true and correct.

GEO. WASHINGTON,

Taken, subscribed and sworn to before me on this the 14th day of June, 1911.

T. E. NEAL,

(Seal) *District Clerk.*

Lien Claimed.

Motion for Judgment by Said Defendant in Error Upon Said Answer of Plaintiff in Error.

This motion appears on page 25 of the record, and, omitting the style of the suit, the same is as follows:

> "Comes now the within plaintiff, Charles W. Miller, and respectfully moves for judgment on the pleadings against the defendant, George Washington, for the relief prayed for in the petition, and for his reason therefor states that the answer of the defendant, George Washington, filed herein, affirmatively shows that the defendant, George Washington, has no defense to this action, and that the plaintiff herein is entitled to the relief sought against him.
>
> WARREN & MILLER,
> *Attorneys for Plaintiff.*"

Statutes and Acts of Congress, or Parts Thereof, Herein Relied Upon.

Chapter 49 of Arkansas was first spread over Indian Territory by an Act of Congress, approved on May 2, 1890, entitled "An Act to Provide the Territorial Government for the Territory of Oklahoma, to Enlarge Jurisdiction of United States Court in the Indian Territory, and for Other Purposes" (26 Stat. L. 81). By which act many statutes of said state were extended to said Territory, and among them was Chapter 49, which is the chap-

ter on Descent and Distribution. So much of said chapter as we think is involved in this case, is as follows:

"*Section 2522.* When any person shall die, having title to any real estate of inheritance, or personal estate, *(b)* not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children, or their descendants, in equal parts;

Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts;

Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts.

"*Sec. 2523.* Posthumous children of the intestate shall inherit in like manner as if born in the lifetime of the intestate, but no right of inheritance shall accrue to any person other than the children of the intestate, unless they be born at the time of the intestate's death.

"*Sec. 2524.* Illegitimate children shall be capable of inheriting and transmitting an in-

heritance, on the part of their mother, in like manner as if they had been legitimate of their mother (e).

"*Sec. 2525.* If a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate.

"*Sec. 2526.* The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate.

"*Sec. 2527.* In making title by descent, it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate, is, or has been, an alien.

"*Sec. 2528.* If there be no children, or their descendants, father, mother, nor their descendants, or any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate. If there be no such wife or husband, then the estate shall go to the state.

"*Sec. 2529.* If any of the children of an intestate be living, and some be dead, the inheritance shall descend to the children who are living, and to the descendants of such children as shall have died, so that each child who shall be living shall inherit such share as would have descended to him if all the children of the intestate who shall have died leaving issue had been living, so that the descendants of each child who shall be dead shall inherit the same as their parent would have received if living.

"*Sec. 2530.* The rule of descent prescribed in the last preceding section shall apply

in every case where the descendants of the intestate, entitled to share in the inheritance, shall be in equal degree of consanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them had all the descendants in the same degree who shall have died leaving issue been living, so that the issue of the descendants who shall have died shall respectively take the shares which their parents, if living, would have received.

"*Sec. 2531.* In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as come by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided (d).

"*Sec. 2532.* The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation.

"*Sec. 2533.* Relations of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same man-

ner as the descendants of the whole blood unless the inheritance comes to the intestate by descent, devise, or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

"*Sec. 2534.* In all cases not provided for by this act, the inheritance shall descend according to the course of the common law.

"*Sec. 2535.* Whenever an inheritance, or a share of an inheritance, shall descend to several persons, under the provisions of this act, they shall inherit as tenants in common, in proportion to their respective shares or rights."

Section 6 of Supplemental Creek Agreement, Approved June 30, 1902.

Said Section 6 is as follows:

"*Repeal—Arkansas Law Effective—Non-Citizens Excluded, When. 6.* The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And, *Provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49."

FACTS INVOLVED IN THE CASE

Waitie Washington, enrolled as a Creek Indian and member of said tribe, died on the 3rd of November, 1907, and left him surviving his father, George Washington, the plaintiff in error, his mother, Sissie Cosar, and a half sister on the side of his mother, Lillian Cosar, and three half brothers and sisters on the side of his father, Wadie, Willie and Lena Washington. During his lifetime said Waitie Washington received his allotment in the Creek Nation, of which he died seized and possessed, and are the lands in controversy. Said Sissie Cosar attempted to convey said lands to one Warren and had said deed approved before the County Court of Hughes County, Oklahoma, where said lands were situated. Said Warren then undertook to make a deed to one W. J. Smith, who afterwards died, and after his death his administrator undertook to convey said lands to the First National Bank; then said bank made said Warren another deed therefor, and he on the same day undertook to make said Miller, the defendant in error, a deed for the same; and thereafter said plaintiff in error was induced to make said Warren a quit claim deed for his interest in said lands. Plaintiff in error seeks to avoid said deed on the ground that it was obtained by misrepresentation upon the part of said Warren and the defendant in error, and, *second*, on the ground that

plaintiff in error is a full-blood Seminole Indian, and so enrolled, and that his said deed was void, as the same was not approved by the Secretary of the Interior or any County Court of said state. Plaintiff in error also seeks to show that said deed was a cloud upon his title to said lands and kept him out of the possession thereof, and that said deed of Sissie Cosar was void, for she was a full-blood Creek and so enrolled, and her said deed was not approved by the Secretary of the Interior, as provided for in Section 22 of the Act of April 26, 1906.

STATEMENT OF LAW INVOLVED

Plaintiff in error maintains, as set up in his answer, that said lands were allotted to said Waitie Washington under the Original Creek Agreement, approved on the 1st of March, 1901; that said lands descended to the heirs of Waitie Washington under Chapter 49 of the Statutes of Arkansas, as shown in Mansfield's Digest of 1884, and which were put in force in Indian Territory and in said Creek Nation under an Act of Congress approved on the 28th of April, 1904; that said land in the hands of said Waitie Washington was a new acquisition, as defined in Section 2531 of said Chapter 49 of Arkansas, under which plaintiff in error took an estate for life with the remainder in fee to his said Creek children, or, if ancestral, he took one-half of said land in fee; that said Act of Congress of April 28, 1904, repealed Section 6 of the Supplemental Creek Agreement, and thereby left said Chapter 49 in full force throughout the Indian Territory, and applied to all persons and estates in said Territory, whether Indian, freedman or otherwise, as so provided in Section 2 of said act. That plaintiff in error, through his said answer, set up and claimed an interest in said allotment under and by reason of said acts therein mentioned, namely, the Original Creek Agreement, and said Act of April 28, 1904, which reimposed all the Statutes of

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Arkansas and extended them in their operation throughout said Territory and to all persons and estates therein. The state courts of Oklahoma in this case held that said Act of April 28, 1904, did not repeal said Section 6 of said Creek Supplement, and that as plaintiff in error was a Seminole Indian he was prohibited from inheriting said lands, or any interest therein, because so forbidden and debarred by said Section 6; but plaintiff in error maintains that he is entitled to a life estate in said lands, as they are a new acquisition, regardless of whether said Act of April 28, 1904, did, or did not, repeal said Section 6; *first*, because a life estate in said lands is not incompatible to the fee thereof, and it was only the fee that was affected by the provisos of said Section 6, which had reference simply to the "lands of the Creek Nation"; and, *second*, that said provisos had no application whatever to actual allotments in said Creek Nation, but referred alone to "the lands of the Creek Nation," which did not include or embrace actual allotments, as so held by the Federal Circuit Court, in *Armstrong* v. *Wood*, 195 Fed. 137.

ARGUMENT AND AUTHORITIES

First Assignment of Error.

That the said Supreme Court erred in holding and deciding that said lands in controversy belong to said Charles W. Miller and that said plaintiff in error had no right, title, interest or estate in or to said lands, without making or requiring to be made as parties thereto the said Frank L. Warren, Union Central Life Insurance Company, L. U. Humphrey and L. L. Humphrey, as prayed for by said plaintiff in error in his said answer; and in which said decision and holding, as aforesaid, there was drawn in question and necessarily decided Section 1 of the Fourteenth Amendment to the Constitution of the United States, which declares that, "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and that said decision and holding is repugnant to and in conflict with said section of said Fourteenth Amendment and deprives the plaintiff in error of his right, title, interest and estate in and to said lands, without due process of law, and denies the said plaintiff the equal protection of the laws, as made and provided in said section.

On page 26 of the record will appear the motion for a new trial before the trial court in the case at bar, where, among other grounds, it was there assigned that said court erred in sustaining the motion of said plaintiff for judgment in his favor upon the pleadings in the case; that said court erred in decreeing said lands and rents to the plaintiff, as against said defendant; that said order and judgment are not sustained by sufficient evidence adduced in the case, but are contrary to both the law and the evidence in the case; and that said judgment was erroneous because of the numerous errors of law occurring at the trial of the case and excepted to by the defendant therein. The exception to said judgment is found in the judgment itself on pages 27 and 28 of the record. As said judgment was rendered on a motion on the pleadings, said motion for a new trial was not at all necessary under the practice and procedure in the State of Oklahoma, *Manes* v. *Hoss*, 28 Okla. 489; *Healy* v. *Davis*, 32 Okla. 296, and *Burdett et al.* v. *Burdett et al.*, 26 Okla. 416, 35 L. R. A. (N. S.) 964; and said Supreme Court could have reviewed said judgment without said motion. But said motion was made to put the jurisdiction of said Supreme Court beyond question in the final disposition of this case. The grounds for a new trial are prescribed in the Statutes of Oklahoma as indicated in Section 5033 of the Revised Laws of Oklahoma of 1910, the sixth ground thereof being "That the verdict, report or

decision is not sustained by sufficient evidence, or is contrary to law"; and the eighth ground thereof is, "Errors of law occurring at the trial, and excepted to by the party making the application."

In *Glaser et al.* v. *Glaser et al.*, 13 Okla. 389, point 2, the Supreme Court held:

> "2. *Motion for New Trial — What Presented by.* The eighth statutory cause for a new trial, *viz.:* 'Error of law occurring at the trial and excepted to by the party making the application' will, when embraced in a motion for new trial, present to the trial court any objection or exception properly made and saved during the progress of the trial, and this includes exceptions to the giving of instructions to the jury; and an assignment of error in this court to the effect that the court erred in overruling the motion for new trial, will present for review by the Supreme Court every alleged error embodied in the motion for new trial."

The exception to said judgment and likewise to the action of said trial court in overruling said motion for a new trial, are seen on the face of the decree on page 27 of the record. As hereinafter shown, a motion for judgment on the pleadings, or demurrer to the pleadings, presents a proposition of law and not of facts, as the facts and allegations of such pleadings are thereby admitted to be true and correct.

In *Fenton* v. *Burleson*, 33 Okla. 230, decided since the case at bar and on the 25th of June, 1912, the same Supreme Court held:

"Where the material averments of plaintiff's petition are denied by the answer of the defendant and facts pleaded showing the same to be untrue, it is error to render judgment for the plaintiff on the pleadings."

The answer of the plaintiff in error contains a general denial of everything set up in the petition of the plaintiff below except the allegation that the plaintiff in error was claiming an interest in the lands there described; but on the trial, plaintiff in error admitted that the plaintiff below was in the possession of said lands. The plaintiff below, without giving the devolution of his title, claimed to be the owner of said lands as to both the legal and equitable title thereto. The answer of the plaintiff in error put him on proof of his title to said lands, and at the same time plaintiff in error set up his own claim and the claim of his children to said lands, and pointed out the Acts of Congress, under which he and his said children were thus legally entitled to said lands and had thus inherited the same from his son, Waitie Washington. By said motion on the pleadings all matters well pleaded in the answer and cross petition of the plaintiff in error were thus admitted to be true. This answer also contained allegations of fraud and misrepresentation upon the part of the defendant in error and his partner in practice of law, by which the plaintiff in error was induced to make the deed for the lands in controversy in this case for the small

sum of $30.00; that said consideration was wholly inadequate; and that said lands comprised 160 acres, situated near the county seat of Hughes County, more than half of which was in actual cultivation and was worth at least $30.00 an acre. All of these facts were admitted to be true on this motion for a judgment, and the same also admitted that the allegations of the defendant in error in his petition were untrue, as shown by the decisions hereinafter cited. Yet in the face of these charges, the court below sustained said motion, rendered judgment against plaintiff in error, held that defendant in error was the owner of said lands, and required the plaintiff in error to pay the costs. If said deed was procured by fraud and misrepresentation, as so alleged in said answer of plaintiff in error, and thus admitted by the defendant in error by his said motion, the plaintiff in error had an unquestionable right to have said deed cancelled and set aside, regardless of whether he had any interest in said lands or not, for he had been thus induced to make the deed which he would not have done had it not been for this wrong of said defendant in error and his partner to whom the deed was thus made. This was a plain violation of and denial to the plaintiff in error of a legal right, contrary not only to the practice and procedure in said state, but likewise contrary to the Fourteenth Amendment to the Constitution of the United States, whereby said plaintiff in error was deprived of his property with-

out due process of law and was denied the equal protection of the law.

In *Leeper* v. *State of Texas*, 139 U. S. 462, 35 L. ed. 225, this court held:

> "*6.* Due process is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right."

> "As to the words from *Magna Charta*, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice."

> *Bank of Columbia* v. *Okelyx*, 4 Wheat. . . . . 4. L. ed. 561.

In *Hager* v. *Reclamation District No. 108*, 111 U. S. 701, 28 Law. ed. 572, this court held:

> "That clause of the 14th Amendment is found, in almost identical language, in the several state constitutions, and is intended as additional security against the arbitrary deprivation of life and liberty and the arbitrary spoliation of property. Neither can be taken without due process of law. What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Justice MILLER in *Davidson* v. *New*

Orleans, to arrive at this meaning 'By the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' 96 U. S. 104 (XXIV 619). It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado v. California (ante*, 232)."

In Vol. 5 of Encyclopedia of United States Supreme Court Reports, pages 619 and 620, the author makes the following statement:

"(2) *Qualification of Rule; Regard to Be Had to Substance and Not to Form.*—The rule here stated is true in the general sense that when the state has provided for the enforcement of private and public rights in the ordinary tribunals of justice by a proceeding that conforms to the recognized forms and principles of law, it has provided a due process of law. It is subject to the qualification that the judicial departments of the government, in administer-

ing the process provided, are themselves subject to the restriction of the due process requirement; that a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment; that the judgment of a state court, or other tribunal of last resort, is the act of the state, and that although the judicial authorities may keep within the letter of the statutes regulating the forms of procedure, and give the parties the fullest opportunity to be heard and a trial in strict compliance with the requirements of the state law, yet, in determining what is due process of law, and whether it has been denied in a given proceeding, the courts look to substance and not to form, and will interfere whenever necessary for the protection of private rights against an arbitrary exercise of power, especially if it results in the taking of private property without compensation" (citing a long list of decisions of this court in support of this text, to which reference is here made).

In passing upon this case, the state court not only departed from the regular judicial procedure and practice of said state, but it entirely failed to recognize or consider the legal force and effect of the facts set up in said answer and cross petition of the plaintiff in error, which were by said motion admitted to be true. The plaintiff in error was therefore deprived of the benefits of the facts thus proven, as well as his rights and interest in said land, without any compensation whatever other than thirty dollars thus obtained for said deed.

Again, it is alleged in said answer of the plaintiff in error that the plaintiff in error "is a full-blood Seminole Indian and is so enrolled on the rolls of said nation, and said pretended deed to said Warren for his interest in said lands as shown by said exhibit 'C', is absolutely null and void, and passed no right, title or interest in said lands, because the same was never approved by the Secretary of the Interior, nor was the same ever approved by any County Court of said state, so far as defendant knows."

The court will bear in mind that Waitie Washington died on the 2nd or 3rd of November, 1907. This was before statehood, and on his death the said lands descended to his heirs under the law as it existed at the time of his death, and whatever rights therein the plaintiff in error inherited from his said son, took effect at the time of his death.

Paragraph three of the answer of plaintiff in error, as shown on page 15 of the record, is as follows:

> "*Third.* That said Waitie Washington was a minor at the time of his death, and was unmarried and left no children or descendants of any child or children, surviving him at the time of his death; that said Waitie was enrolled as a full-blood Creek citizen, and his roll number was 5494; that he was duly enrolled on the 7th day of March, 1900; and that the lands in controversy in this suit was the allotment made and assigned to said Waitie Wash-

ington as his proportional part of the Creek Nation, on the final allotment of said nation, and the same was so allotted and the patents therefor issued and recorded and delivered, during the lifetime of said Waitie; that said lands were so allotted to said Waitie under and by virtue of an Act of Congress entitled 'An Act to Ratify and Confirm an Agreement With the Muskogee or Creek Tribe of Indians, and for Other Purposes,' passed on the first day of March, 1901; and at the time of his death, said lands passed by the laws of descent then in force in said Indian Territory, which was Chapter 49 of the Statutes of Arkansas, as compiled in Mansfield's Digest of 1884, put in force in said Territory by an Act of Congress, the last time, on the 28th of April, 1904, by an act entitled, 'An Act to Provide for Additional United States Judges in Indian Territory, and for Other Purposes;' and that said Chapter 49 had on several other times before the death of said Waitie Washington been put in force on said Territory, and was in full force and effect in said Territory at the time of his death as aforesaid, and the title to said lands passed to his heirs thereunder."

The first part of paragraph four of said answer is as follows:

"That on or about the 16th of July, 1909, said Sissie Cosar and Mack Cosar pretended to make and execute to one Frank L. Warren a deed for said lands hereinbefore mentioned and described, and on the same day pretended to have the same approved by the County Court of said County of Hughes, and the same were

placed of record in the office of the register of deeds of said county in deed book No. 'B,' on page 579, etc.; that on the same day and date, said Warren pretended to convey the said lands to one W. J. Smith (now deceased), and recorded in said office in deed book No. 1 on page 531; that on the 21st day of December, 1909, one Oscar S. Penny, as the administrator of said Smith's estate, pretended to make and execute to the First National Bank of Holdenville, a deed for said lands, and the same was placed of record in said office in deed book No. 4 on page 259; that on the 26th day of January, 1910, said bank pretended to make and execute to said Warren another deed for said lands, and the same was placed of record in said office, in deed book No. 4, on page 349; that on the same last named date said Warren and wife pretended to make and execute to said Charles W. Miller, the plaintiff herein, another deed for said lands, and the same was placed of record in said office in deed book No. 3 on page 397," etc.

In his petition in the trial court, said defendant in error alleged as his cause of action:

"That the said plaintiff is the owner of the legal and equitable estate in the southeast quarter of section thirty-six (36), township eight (8) north and range eight (8) east, and that he is in possession of the same; that the defendants, George Washington, Sissie Cosar and Lillie Cosar, claim some estate or interest in and to said land; that the said defendants have no right, title, estate or interest in and to said land, and that their claim of same is a

cloud upon the title of this plaintiff; that the defendant, Lillie Cosar, is a minor of the age of thirteen years."

In the first part of his answer, the plaintiff in error "denies each and every charge, statement and allegation made and contained in said petition, except that the defendant is claiming an interest in the lands mentioned and described in said petition, and as to that charge says that the same is true and defendant does claim an estate, right and interest in said lands as hereinafter set forth"; and on the trial of said cause admitted that said defendant in error was in the possession of said lands.

Under the pleading and practice of the State of Oklahoma and of Kansas, from which the chapter on pleadings was adopted, a general denial in the answer of the defendant of the material allegations in the petition, puts the plaintiff on proof of every material allegation to sustain his cause of action, *Robinson et al.* v. *Peru Plow & Wheel Co.*, 1 Okla. 140; *Nix* v. *Gilmer*, 5 Okla. 741, point 3, which is as follows:

> "An answer, which denies each and every material allegation of the petition of the plaintiff, is sufficient, as a general denial;"

Payne v. *McCormick Harvesting Machine Company*, 11 Okla. 318, point 5, as follows:

> "5. *Replevin—Defense.* Under the general denial in replevin, the defendant may make any defense, which will defeat the plaintiff's

> claim or right to possession as against the defendant, and under the code great liberality is allowed to such defenses;"

in *Hopkins* v. *Dipert*, 11 Okla. 630, point 1 is as follows:

> "*Conversion — General Denial Puts in Issue Question of Ownership.* In an action to recover the value of personal property, a general denial puts in issue the plaintiff's allegation of ownership."

In *Munn* v. *Taulman*, 1 Kan. 355, point 4, the Supreme Court of Kansas held:

> "4 * * * *Defense.* An allegation in an answer that defendant 'says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he denied each and every allegation in plaintiff's petition alleged against him,' is sufficient to apprise the plaintiff what defense is intended to be set up in bar of his claim, and, under section two of the code, is all that the law requires."

Section 4745 of the Revised Laws of Oklahoma provides:

> "The answer shall contain: *First*, a general or specific denial of each material allegation of the petition controverted by the defendant; *second*, a statement of any new matter constituting a defense, counter claim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition."

It therefore follows that this general denial of the plaintiff in error imposed upon the defendant in error the burden of proving that said defendant in error, Charles W. Miller, was "the owner of the legal and the equitable estate" in said lands in controversy in said suit. No evidence whatever was ever adduced by said defendant in error as to any facts alleged in the petition; but instead, he makes this motion for judgment on the pleadings, which admits the truth of every fact and allegation set forth in the answer. But, it is contended by the defendant in error and was so held by said state courts, in effect at least, that the matters set up in the answer of the plaintiff in error not only showed that the plaintiff in error had no interests in said lands but that said defendant in error was the owner thereof, and decreed accordingly.

The rights and interests of the plaintiff in error are set up in the second and third paragraphs of his answer, wherein he shows his relationship to Waitie Washington; that Waitie Washington died on the 2nd or 3rd of November, 1907; that said lands were obtained through the Act of Congress, approved March 1, 1901; that Chapter 49 of the Statutes of Arkansas, as compiled in Mansfield's Digest of 1884, put in force in said Territory the last time by an Act of Congress approved the 28th of April, 1904, "was in full force and effect in said Territory at the time of his death as aforesaid, and

the title to said lands passed to his heirs thereunder." These facts are admitted as true, and under Chapter 49 of said Statutes of Arkansas, the plaintiff in error, as the father of said deceased child, inherited an interest in said lands; but we will dissecuss that feature fully under the second assignment of error.

Under paragraph four of said answer the devolution of title to said defendant in error is set forth; and under this paragraph it is contended, and was so held, that it supplied conclusive proof of the title of said defendant in error to the lands in controversy, and, therefore, the said motion for judgment was proper. The court will observe that in this paragraph it is charged that on or about the 16th of July, 1909, said Sissie Cosar and said Mack Cosar pretended to make and execute to one Frank L. Warren a deed for said lands herein mentioned and described, and on the same date pretended to have the same approved by the County Court of said County of Hughes. We deny that said Sissie Cosar had the fee to the lands, and further deny that said County Court of Hughes had any right, power or authority to approve said deed, although the reverse of this was held by said Supreme Court in the case of *MaHarry* v. *Eatman*, 29 Okla. 46.

Waitie Washington died on the 3rd of November, 1907. On the 26th day of April, 1906, Congress passed an act entitled "An Act to Provide for the Final Disposition of the Affairs of the Five Civil-

ized Tribes in the Indian Territory, and for Other Purposes," and Section 22 of this act provides:

> "*Sec. 22.* That the adult heir of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

It is alleged in the answer that Sissie Cosar is a full-blood Creek and so enrolled, another fact thus admitted. Under this section her deed, even if she had been the owner of said lands, would therefore have to be approved by the Secretary of the Interior, and it was so held by this court in *Tiger v. Western Investment Co.*, 221 U. S. 286, 55 L. ed. 738. But it is contended that under Section 9 of another Act of Congress approved on the 27th of

May, 1908, entitled "An Act for the Removal of Restrictions on Part of Lands of Allottees of the Five Civilized Tribes, and for Other Purposes," that the County Court of Hughes County could approve said deed and the title would thereby pass; which section in part provides:

> "That the death of an allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such lands shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," etc.

Waitie Washington was the deceased allottee; but there is nothing in this record to show that the County Court of Hughes County had "jurisdiction of the settlement of the estate of said deceased allottee." This answer of plaintiff in error is duly sworn to, as may be observed on page 18 of the record; and, being thus sworn to, it put the plaintiff below upon proof of the proper execution of these deeds and of the authority of said court, under Section 4759 of the Revised Laws of Oklahoma, which is as follows:

> "4759. *Verification of Denial Required, When.* In all actions, allegations of the execution of written instruments and endorsements thereon, of the existence of a corporation or partnership, or of any appointment of authority, or the correctness of any account duly verified by the affidavit of the party, his agent or

attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

In the case of *Manning* v. *Stroud State Bank*, 26 Okla. 625, a motion was made for judgment on the pleadings, where the answer was verified at the time of the judgment, and the Supreme Court of said state held:

> "*Pleading — Unauthorized Verification — Judgment on Pleadings.* An unverified answer embodying a plea of *non est factum* having been filed, and on the day the case was set for trial, but before it was called for trial, the defendant, without having first obtained leave of the court, having verified the answer before the clerk of the court, the plaintiff without moving to strike the answer from the file, moved for judgment on the pleadings, which was granted by the court. *Held*, that this was error" (citing 22 Enc. Pl. & Pr. p. 1048).

The answer of the plaintiff in error does not admit the execution of the deeds therein referred to, but in this particular it states that said Cosars "pretended to make and execute to one Frank L. Warren a deed for said lands hereinbefore mentioned and described;" and that "on the same day and date, said Warren pretended to convey said lands to one W. J. Smith," etc. Thus, these allegations respecting these several deeds are by no means allegations or admissions that the same were duly executed; and the answer being under oath and denying the power and authority of said Cosars to

make said deed or that said deed conveyed the fee simple title to said lands, the burden of proving these matters was thus imposed upon the defendant in error. Said answer being thus verified, it was plain error to sustain said motion, as so held by said court in *Manning* v. *Stroud State Bank, supra.* We call the attention of the court to the further fact, that this deed of said Oscar Penny was made to said Bank as the administrator of the estate of W. J. Smith. Here, said answer being under oath, the defendant in error was again called upon to show by what authority said Penny could thus execute a valid deed for the lands; that no proof that said Penny was such administrator, or that, even if he had been the administrator was shown, that he had any such authority to make such deed. It, therefore, follows that the execution of these deeds, or rather their validity, and the authority of said court and said Penny being thus put in issue, it was error to sustain said motion for judgment on the pleadings.

But, if it should be conceded that said Cosars actually signed said deed to said Warren and said County Court thus attempted to approve the same, still, we insist that said deed to said Warren was absolutely null and void and passed no title to said lands whatever, for the reason that said Waitie Washington having died before the passage of said Act of May 27, 1908, said County Court had no power, authority or jurisdiction to thus approve said deed. It is claimed on behalf of the defendant in

error that said court had such jurisdiction and obtained it under said Section 9 of said last named act. But it is our contention that said act is prospective, and not retroactive, in its nature, scope and character; and that such courts have no jurisdiction whatever to approve deeds of full-blood heirs where the allottee died prior to the passage of that act. The provisions of Section 9 confer upon such courts federal power and authority, whereby such courts may approve such deeds as fall within the provisions of said act. Such courts, therefore, in the approval of such deeds, were acting in the capacity of federal officers, and their acts are judicial, or at least *quasi*-judicial, *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 33 L. ed. 687, 694, 695; and *United States* v. *Missouri K. & T. R. Co.*, 141 U. S. 358, 375, 376, 35 L. ed. 766, 771, 772; and are federal in their nature and character, *Thomas* v. *Loney*, 134 U. S. 372, 33 L. ed. 950, and cases cited. This act, being a release of sovereign powers, among which is the right to restrict the alienation of Indian land, are never enlarged by implication, unless the language used in the act makes it imperative; but such acts must be construed strictly, *Charles River Bridge Co.* v. *Warren Bridge Co.*, 11 Pet. 420, 9 L. ed. 773; *Mills* v. *St. Clair Co.*, 8 How. 569; *Newton* v. *Mahoning County*, 11 U. S. 548, 25 L. ed. 710; and *Central Trans. Co.* v. *Pullman Palace Car Co.*, 35 L. ed. 65. And in *Hannibal and St. Joseph R. R. Co.* v. *Missouri River Packing Co.*,

125 U. S. 260, 31 L. ed. 736, it was held that a statute, being a grant of a privilege, must be construed most strongly in favor of the grantor; and if there is any doubt as to the proper construction of the statute, it must be resolved in favor of the government, citing a long line of decisions of this court in favor of this position.

Then, again, the language of said Section 9 of said Act of Congress, indicates that the "court" therein referred to must be the County Court, for it follows up the description thereof by the phrase "having jurisdiction of the settlement of the estate of said deceased allottee," which alone, under the laws of this state which existed when said act was passed, was the County Court. But still the County Court "having jurisdiction," etc., must be determined by the laws of this state, if they are applicable, and the same, as well as all other probate laws, require, in order to confer jurisdiction, the death of the ancestor (except in exceptional cases not here applicable); the existence of an estate upon which to administer; and the proper proceedings before such court, *Scott* v. *McNeal*, above cited; and the residence of the deceased, two of which, *death* and such *residence*, are indispensable. Church on Probate Law and Practice, Vol. 1, page 297.

Then it would seem to follow that, unless the estate of "said deceased allottee" was actually administered upon, or at least being administered up-

on by the County Court, which thus attempted to approve a "conveyance" for such "deceased allottee's lands," the deed would be void even if the lands so conveyed were "inherited lands," for it is self evident that no court has jurisdiction of a case, controversy or subject matter of litigation, until such matters are properly brought before it in the way and manner provided by law for such purpose. True, it may be capable of such jurisdiction as it actually has when they are properly brought before it, but it will hardly be contended that a court has jurisdiction of any matter until that matter is legally presented to it; and our statute—1 Laws of Probation, Settlements, etc.—prescribe just what must be done in order to confer such jurisdiction, and the way and manner in which it must be done, in order that such matters may be legal.

We submit that under this deed of the Cosars the title to said lands did not pass to said Warren, and could not have passed only by and through the approval of the Secretary of the Interior, as provided in Section 22 of the Act of April 26, 1906, *Stephens* v. *Smith*, 77 U. S. 321, 19 L. ed. 933; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 55 L. ed. 738. This was not done or pretended to have been done in this case, and the burden of showing the legal execution and proper approval of said deed was on the defendant in error, *Stephens* v. *Smith*.

The opinion of the attorney general construing this Act of May 27, 1908, was given on the 19th of August, 1909, and in that opinion he holds:

> "Conveyances made by full-blood Indian heirs, of lands in Oklahoma inherited by them prior to the Act of May 27, 1908 (35 Stat. 312), are not valid unless approved by the Secretary of the Interior, even though they shall be approved by a probate court of Oklahoma.
>
> The provisions of Section 9 of the Act of May 27, 1908, cannot be held to operate retroactively and to remove absolutely all restrictions upon the alienation of the lands of an allottee who died prior to the passage of that act," (citing as authority Endlich on Interpretation of Statutes, Secs. 271, 272 and 292).

So it may be observed that the very thing the attorney general says cannot be done, was attempted in the case at bar; and unless he is wrong in his opinion, all the deeds offered in evidence in this case, even including the one they claim was approved by the County Court, are absolutely null and void, and passed no title to Miller whatever.

In his opinion, the attorney general is reinforced and substantiated by Black on Interpretation of Laws, page 250, Sec. 103, where the author lays down this proposition:

> "Except in the case of remedial statutes and those which relate to procedure in the courts, it is a general rule that acts of the legislature will not be so construed as to make them operate retrospectively, unless the legis-

> lature has explicitly declared its intention that they should so operate, or unless such intention appears by necessary implication from the nature and words of the act so clearly as to leave no room for a reasonable doubt on the subject" (citing as authority for this proposition a long and numerous line of decisions of England, Canada and nearly every state of this Union).

To the same effect is Cooley's Constitutional Lim., page 529, where the author says:

> "There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *ea nomine*, by the state constitution, and provided further that no other objection exists to them than their retrospective character. Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively" (citing a long line of decisions to support the text).

But the proposition here is: Not whether Congress had such power to pass a retrospective act, but, Is the Act of May 27, 1908, retrospective in its character, permitting Indian heirs to alienate their lands inherited before the act was passed, without the approval of the Secretary of the Interior, and by merely having a deed therefor, made either before, or after, the act passed, approved by the County Court? These authorities lay down the proposi-

tion that unless the statute so expressly provides, or the same is necessarily implied from the express provisions of the statute itself, such statutes should not be construed to be retrospective.

It is a familiar principle of law that in construing a statute, the court may not only look at the act itself, but likewise to other statutes *pari materia*, and even to the history of the legislation on that subject, and especially is this true as to the formation of a general land system where the lands are under the control of that legislature. It has always been the policy of this government to protect the rights and interests of the Indian from the earliest period of its control of government affairs; and in construing Indian Acts of Congress the safety and preservation of the Indian and his rights in property should ever be kept steadily in mind, and the scope of such act not enlarged beyond the clear and express intention of Congress, to be gleaned first from the act itself, then from the historic and legislative developments which actuated the legislative enactment. In other words, such act should be construed most beneficial to the Indian who occupies the position of wardship toward the government, and as to whom, like statutes pertaining to infants, married women and persons under disabilities, such statutes should be construed strictly, and nothing read into them which is not expressly embraced or so plainly intended that its purpose becomes clearly

obvious. That, unless so expressed or implied, statutes are to be construed prospectively, and not retrospectively, may be seen in the following decisions of this court: *Murray* v. *Gibson*, 15 How. 421, 14 L. ed. 755; *McEwen* v. *Den et al.*, 24 How. 242, 16 L. ed. 672; *Shon* v. *Waterson*, 17 Wall. 596, 21 L. ed. 738, citing *U. S.* v. *Heth*, 3 Cranch 413, and *Harvey* v. *Tyler*, 2 Wall. 347; *Heong* v. *U. S.*, 112 U. S. 536, 28 L. ed. 770, point 3; *City R. Co.* v. *Citizens Street R. Co.*, 166 U. S. 557, 41 L. ed. 1114; and to the same point may be found a very extensive citation of decisions both state and federal, on pages 5412 and 5413 of Vol. 5 of the Digest of U. S. Supreme Court Reports.

It but remains to apply these principles to the Act of May 27, 1908, to determine whether that act either expressly or necessarily implies that said act was to be construed prospectively or retroactively; but the attorney general has already construed said act not to be retroactive, and therefore does not permit the alienation of lands inherited by full-blood Indians of the Five Civilized Tribes, prior to the passage of the act, unless the deed therefor is approved by the Secretary of the Interior, even though it may have been approved by the Probate Court of Oklahoma. That is the case at bar, and holds that this deed to Warren is absolutely null and void.

> "The cotemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled

to great respect and should ordinarily control the construction of the statute by the courts."

Pennoyer et al. v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363.

To the same effect are *U. S.* v. *Johnson*, 124 U. S. 236, 31 L. ed. 389; *Heath* v. *Wallace*, 138 U. S. 573, 34 L. ed. 1063; *Hahn* v. *U. S.*, 127 U. S. 402, 27 L. ed. 527; *U. S.* v. *Moore*, 95 U. S. 760, 24 L. ed. 588; and *U. S.* v. *Hill*, 120 U. S. 169.

The Supreme Court of the state in said case of *MaHarry* v. *Eatman*, and likewise the federal District Court of Eastern District of Oklahoma, in *Harris* v. *Gale*, 188 Fed. 712 (we believe that is the case), have held the very reverse of our contention; but still this does not settle the proper construction of this statute, as:

"Federal statutes must be interpreted by the federal courts independently of local considerations, and cannot be said to have an established meaning, whatever the decisions of other courts may have been, until they are *construed by the Supreme Court of the United States.*"

Calhoun Gold Mining Co. v. *Ajax Gold Mining Co.*, 182 U. S. 492, 45 L. ed. 1200.

This feature of the case respecting the approval of said deed by said court, owing to its vast importance among said Five Civilized Tribes, deserves a more complete consideration than is here given. But unless the plaintiff in error inherited

an interest in said lands, that feature is unimportant as to him, and for that reason we will close that branch with what is above stated.

We next call the court's attention to the fact that it is alleged in said answer that said Penny, as the administrator of the estate of said Smith, pretended to make said bank a deed for said lands, whereupon said bank executed to said Warren another deed, and on the same date said Warren and wife pretended to make said Miller a deed therefor.

In the first place, on the death of said Smith, the title to said lands, if thus previously conveyed to him by said Warren, passed to his heirs under the laws of descent of Oklahoma. Said Penny as his administrator therefore had no power or authority to convey the same to said First National Bank, unless such authority had been shown on the trial of this case, which was not done. Said deed is therefore apparently void and passed no title to said lands. Then again, said bank being a National Bank, had no right or legal capacity to purchase said lands, and this undertaking was in violation of the law governing National Banks.

Again, it is charged in paragraph four of said answer that said lands were derived from said Act of Congress, approved on the 1st day of March, 1901, and that the same descended under Chapter 49 of Arkansas, under said act approved on the 28th of April, 1904. This gave the devolution of the title

to both Waitie Washington and his heirs; and these charges and statements were thus admitted to be true and correct on said motion for judgment. This is an action to quiet title to the lands in controversy, in which case, there being a general denial of the substantive matters as to that title, the plaintiff below was obliged to recover, if at all, upon the strength of his own title and not upon the weakness of the claims of title of the defendant, *Hearst* v. *Sawyer*, 2 Okla. 470; *Mitchell* v. *Lianes*, 13 Pac. 592; *Hurd* v. *Harvey County*, 19 Pac. 325; *Jennings* v. *Brown*, 20 Okla. 294, and *Barnes* v. *Stonebreaker*, 113 Pac. 905. Yet, in the face of this fact and the various defects in the plaintiff's title to said lands, as shown upon the face of the answer of the plaintiff in error, as heretofore pointed out, said state courts sustained his motion for judgment on the pleadings, and decreed him the fee simple title to said lands, contrary to the law of this case and of the law of procedure of said state. We submit that this is contrary to the law that governs this case; that said judgment and decree is contrary to such law, and that the same is not due process of law, as guaranteed under said respective Acts of Congress and the Fourteenth Amendment to the Constitution of the United States.

Second Assignment of Error.

That the said court erred in holding that under the facts presented in the record and proceedings in this case the plaintiff in error, George Washington, did not inherit any estate in and to the said allotment of the said Waitie Washington, deceased.

This assignment goes to the merits of the case on the law and facts, set forth in the answer of the plaintiff in error, and the effect thereof on this motion of the defendant in error for judgment on the pleadings.

A motion upon the pleadings for judgment cannot be made to take the place of a demurrer or other plea—*Roberts* v. *Colorado Springs, etc., R. Co.*, 101 Pac. 59; *Shuler* v. *Allam*, 45 Colo. 372, 101 Pac. 350 and 352, where a number of decisions to that effect are cited.

Mr. Jury, in his recent treatise on Adjudicated Form of Pleading and Practice, page 1885, says:

> "As a general proposition, a motion for judgment on the pleadings, based on facts thereby established, cannot be sustained except where, upon such facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced; or, in other words, such a motion cannot be sustained unless, under the admitted facts, the moving party is entitled to judgment without regard to what the findings might be on the facts upon which issue is joined. There-

fore, in determining the rights of the defendant to the judgment given him, the real question to determine is the sufficiency of the admitted facts to warrant the judgment rendered and the materiality of those on which issue was joined. A motion on the pleadings cannot prevail unless, on facts thereby established, the court, as a matter of law, can pronounce judgment on the merits; that is, determine the rights of the parties to the subject matter of the controversy, and render judgment in relation thereto which is final between the parties. Such a motion cannot, under the guise of a motion for judgment on the pleadings, be substituted for some other plea—*Mills* v. *Hart*, 24 Colo. 505, 52 Pac. 680, 65 A. St. Rep. 241, citing *Rice* v. *Bush*, 16 Colo. 484, 27 Pac. 720; *Harris* v. *Harris*, 9 Colo. App. 221, 47 Pac. 841, approved in *Hoover* v. *Horn*, 45 Colo. 188, 101 Pac. 59, 61."

But this summary of this subject is no more cogently expressed than by the Supreme Court of Oklahoma in the case of *Cobb* v. *Wm. Kenefick Co.*, 23 Okla. 440, where it held:

> "A motion for judgment on the pleadings is a common and permissible practice, but, in a case where filed by the plaintiff to a defendant's answer, it should be granted only when such answer, allowing every reasonable intendment in its favor, does not deny or state a defense to the material allegations of the petition."

This principle is simply this: Where the answer denies the material allegations of the petition, or states a defense thereto, a motion of the plaintiff for a judgment on the pleadings will not lie;

and in determining whether the material allegations are denied, or whether a defense is stated in the answer, that answer is liberally construed in favor of the defendant and his answer.

Let me again call the court's attention to the fact that in paragraph three of the answer of plaintiff in error, it is there alleged:

> "That the lands in controversy in this suit was the allotment made and assigned to said Waitie Washington as his proportional part of the Creek Nation, on the final allotment of said nation, and the same was so allotted and patents therefor issued and recorded and delivered, during the lifetime of said Waitie; that said lands were so allotted to said Waitie under and by virtue of an Act of Congress entitled 'An Act to Ratify and Confirm an Agreement With the Muskogee or Creek Tribe of Indians, and for Other Purposes,' passed on the first day of March, 1901; and at the time of his death, said lands passed by the laws of descent then in force in said Indian Territory, which was Chapter 49 of the Statutes of Arkansas, as compiled in Mansfield's Digest of 1884, put in force in said Territory by an Act of Congress, the last time, on the 28th day of April, 1904, by an act entitled 'An Act to Provide for Additional United States Judges in Indian Territory, and for Other Purposes;' and that said Chapter 49 had on several other times before the death of said Waitie Washington been put in force in said Territory, and was in full force and effect in said Territory at the time of his death as aforesaid, and the title to said lands passed to his heirs thereunder."

Here the plaintiff in error specifically points out the Act of Congress under which said lands were allotted to said Waitie Washington, and also the law of descent which was then in force at the time of his death, and which is therein alleged to be "Chapter 49 of the Statutes of Arkansas, as compiled in Mansfield's Digest of 1884"; and that the same "was in full force in said Territory at the time of his death as aforesaid, and the title to said lands passed to his heirs thereunder."

Paragraph five of said answer, in part, alleges:

> "That defendant is now informed and believes and so charges that he was entitled to either an undivided one-half interest and estate in and to said lands in fee simple, or to an estate for life in and to all of said lands, as an heir of said Waitie Washington."

On this motion for judgment by the defendant in error, these facts above stated, as embraced in paragraphs four and five of said answer, were taken as true and correct. This fixes the law of descent existing at the time of the death of Waitie Washington "as Chapter 49 of the Statutes of Arkansas, as compiled in Mansfield's Digest of 1884, put in force in said Territory by an Act of Congress, the last time, on the 28th of April, 1904, by an act entitled, 'An Act to Provide for Additional United States Judges in the Indian Territory, and for Other Purposes,' and that the same was in force and effect in said Territory at the time of his death as aforesaid,

and the title to said lands passed to his heirs thereunder."

It being thus admitted that said Chapter 49 was in full force and effect at the time of the death of Waitie Washington, and that "*the title to said lands passed to his heirs thereunder,*" defendant in error cannot now dispute these facts or the law of descent which governs the descent of the lands in controversy. We, therefore, have but to look to said Chapter 49 to determine who were the heirs of Waitie Washington as therein provided, and what right, interest or estate in and to said lands such heirs thus inherited under said chapter.

Under these admitted facts and allegations, we respectfully submit that the law of descent as prescribed in Section 6 of the Supplemental Creek Agreement has nothing whatever to do with the merits of this case, since said section puts Chapter 49 of Arkansas in force in said Creek Nation as of the 8th of August, 1902, with the modification "that only citizens of the Creek Nation, male and female, or their Creek descendants, shall inherit lands of the Creek Nation: and, *provided further*, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs, in the order named in said Chapter 49."

All the heirs to the estate of Waitie Washington were set forth in said answer, where it was

shown that, at the time of his death, he left the plaintiff in error, his father; Sissie Cosar, his mother; Lillian Cosar, his half sister on the side of his mother, and Widie Washington, Willie Washington and Lena Washington, his half brothers and sisters on the side of his father, all of whom were still living at the time of this action.

As so stated in said paragraph three of said answer, said lands were allotted to said Waitie Washington under said Act of Congress entitled "An Act to Ratify and Confirm an Agreement With the Muskogee or Creek Tribe of Indians, and for Other Purposes," passed on the first day of March, 1901. Said lands being thus derived to Waitie Washington, through and by reason of this Act of Congress, the same came to him through the terms and provisions of said act, and especially as therein provided in Sections 3 and 23 of said act, and was derived solely thereunder, not from some ancestor whereby it could become an ancestral estate, but from the federal government and said Creek Nation. It therefore follows that said lands in the hands of said Waitie Washington was a new acquisition; and upon his death, as aforesaid, the same descended to his heirs as a new acquisition in the way and manner prescribed in Section 2531 of said Chapter 49 of Arkansas. This conclusion thus reached upon the facts thus admitted as true by this motion of the defendant in error for a judgment on the pleadings, would seem to be conclusive and at

once put an end to this controversy; for, under said Section 2531, said lands being a new acquisition, it is apparent that the father of Waitie Washington, the plaintiff in error in this case, took a life estate in said lands, and the fee thereto descended, in remainder, to the collateral kindred of said intestate, in the manner provided for in said chapter, according to the numerous decisions of the Supreme Court of Arkansas construing said chapter prior to its adoption. But, as the opinion of said Supreme Court considered said Section 6 of said Supplemental Agreement and other Acts of Congress, in its opinion delivered in this case, we will not rest the merits of our case simply upon the result of such admissions, but will try to present every aspect of this case.

Let us then ascertain what is an ancestral estate, and what a new acquisition under said statute. We will first ascertain what is an ancestral estate:

In Bouvier, Vol. I, page 141, an ancestral estate is defined as follows:

> " 'Ancestral estates are such as come to the possessor by descent.' 3 Wash. R. Prop. (5th ed.) 411, 412.
>
> Note 16 of Am. & Eng. Ency. of P. & P., page 909, is as follows:
>
> '*(a)* Ancestral estates are such as are transmitted by descent, and not by purchase. 4 Kent. Com. 404, quoted in *Bowen* v. *Hackney*, 136 N. C. 187, 48 S. E. 633, 67 L. R. A. 440.

"*(b)* Ancestral property is realty which came to the intestate by descent or devise, from a now dead ancestor, or by deed of actual gift from a living one; there being no other consideration than that of blood.

Non-ancestral property is realty which came to the intestate in any other way.' Walker's Am. Law (10th ed.) 392, quoted in *Brown* v. *Whaley*, 85 Ohio St. 654, 49 N. E. 479, 65 Am. St. Rep. 793. See to the like effect *Gossain* v. *Gossain* (Eng.) 196."

To the same effect, and using practically the same language, is Words and Phrases, Vol. I., page 382, and citing *Brown* v. *Whaley* as authority.

This classification seems to have been of very ancient origin, and had its influence in the days of feudalism. In Blackstone, Book 2, page 212, the author observes:

"For if the feud of which the son died seized, was really *feudum antiquum*, or one descended to him from his ancestor, the father could not possibly succeed to it, because it must have passed him in the course of descent before it came to the son; unless it was *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it was *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feudal constitution, which was founded as well upon the personal merits of the vassal, which might be transmitted to his children, but could not

descend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal service. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, or with all the qualities annexed to a feud descended from an ancestor, such feud must in all respects have descended as if it had been an ancient feud; and therefore could not go to the father, because if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum*, or strictly *antiquum*, in none of these cases the father could possibly succeed."

And on page 221, the same author again observes:

"When feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to the feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seized of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassel from his ancestor, his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance."

In Kent's Co. Vol. 4, page 405, the author observes:

> "There is a difference, also, in the laws of the several states, between the succession to estate which the intestate had acquired in the course of descent, or by purchase. If the inheritance was ancestral, and came to the intestate by gift, devise, or descent, if passed to the kindred who are of the blood of the ancestor from whom it came, whether it be in the line of the paternal or maternal line, so as to exclude the relations in the adverse line until the other line be exhausted. This is the rule in Rhode Island, Connecticut, New York, New Jersey, Ohio, Virginia, Tennessee and North Carolina."

In 14 Cyc 28, the author observes:

> "The general rule is that the land of an intestate obtained by gift, devise, or descent from an ancestor, goes to the blood of the ancestor from whom it came, in preference to the next of kin of the deceased not of his blood" (citing decisions of the Supreme Court of Arkansas, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania and the United States).

To the same effect is Woerner on Am. Law of Administration, Section 72, where the same states are referred to.

Tiedeman on Real Prop., page 628, Sec. 670, under the head line, "Ancestral Property," observes:

> "This term, when used in the law of descent, signifies the property which the intes-

> tate himself acquired by descent. * * * But, according to the common law, no one could be heir to ancestral property, unless he is likewise the heir of the last purchaser. But in the United States it would seem that no such distinction is made between property acquired by purchase and by descent, unless expressly established by statute."

But in Chapter 49 of Arkansas, it is expressly so provided by statute, and the common law ancestral estate is enlarged to include not only lands which *descend from* some ancestor, but likewise those derived from an ancestor by *gift* or *devise*, as will appear in subsequent parts of this brief.

In Volume XXVII. of the American and English Encyclopedia of Law (2nd ed.), page 299, the author observes:

> "In pursuance of a policy of keeping real property in the line of the ancestor by whom it was brought into the family, statutes have been enacted in many of the United States which, generally speaking, recognize a distinction between estates which were acquired by the intestate's own industry, and estates which were derived from some ancestor, and direct that the latter shall go to the intestate's next of kin, who are of the blood of the person from whom they were derived. These statutes vary in their phraseology. In some of the statutes, the distinction made is between 'ancestral' and 'non-ancestral' estates. In others, the distinction is between 'ancestral' and 'new acquisitions,' or 'acquired estates.' In yet other stat-

utes, ancestral estates are referred to as estates 'come by' or 'on the part of' the father or mother. Many of the statutes are more explicit, and, instead of speaking of ancestral estates as above, refer to them in express terms as inheritances which come to the intestate by descent, devise or gift from some one of his ancestors."

On page 300, the author defines ancestral estates as follows:

> "Ancestral estates, as the term is employed in these statutes, may be defined to be estates which come to the intestate in the regular course of descent, and estates which may have been devised to him, or which may have been conveyed to him by deed of gift, but which, or at least part of which, he might have inherited had there been no such devise or deed of gift."

From these authorities, it will be observed that an *ancestral estate* is one derived by descent, devise or gift from some ancestor or person who is of the blood of the intestate, and on the death of such intestate the lands thus so obtained will go back to the "ancestor," if living, and if deceased, to those who are next of kin to that ancestor.

Under Chapter 49 of Arkansas, which was in force in Indian Territory at the time Waitie Washington died, on the 3rd day of July, 1907, two kinds of estates are provided for, namely, ancestral, and new acquisitions. Section 2522 thereof is as follows:

"When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner: *First*—To children, or other descendants, in equal parts. *Second*—If there be no children, then to the father, then to the mother, then to the brothers and sisters, or their descendants, in equal parts."

Section 2531 thereof provides as follows:

"In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall descend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

It is not necessary at this time to give other portions of said statute. These two sections provide for the disposition of all estates which fall under the chapter, and from its provisions it will be observed that every estate must come within the one provision or the other. In other words, each estate must be either ancestral, or a new acquisi-

tion, and thus be disposed of under such circumstances therein provided for, by either the one section or the other. Section 2522 provides for ancestral estates, while Section 2531 disposes of new acquisitions. The lands in controversy must, therefore, fall under one of these sections or the other, and be disposed of accordingly. Then under which does it fall, in other words, is it an ancestral estate, or a new acquisition?

The leading case of the Supreme Court of Arkansas, in construing this statute, is that of *Kelly's Heirs* v. *McGuire et al.*, 15 Ark. 555. In construing that statute, that court, in the syllabus of the case, observed:

> "The construction of our statute of Descent and Distributions (Chapter 56, Digest) is:
>
> *First*—That, as to both real and personal property, it was the design of the Legislature, when there were descendants of the intestate, to send down both of them, *per capita*, if in equal degrees, and *per stirpes*, if in unequal degrees, without regard to the fact as to how the estate was acquired.
>
> *Second*—That, as to personal property, it was the design, where there were no descendants, that it should go to collaterals in the same way it would have gone to descendants, if there had been any; that is to say, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, and without inquiry as to how the property was acquired by the intestate.

Third—That, as to real estate, it was the design of the Legislature, where there were no descendants, to point out the line of succession, and that this is to depend on the fact whether the inheritance is ancestral or new; and if ancestral, then whether it came from the paternal or maternal line.

Fourth—If the inheritance was ancestral, and came from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion of the mother's line; and so, on the other hand, if it came from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

Fifth—If the inheritance be not ancestral, but a new acquisition, then, after a life estate reserved in succession to the father and mother, if alive, it will go in remainder, first, to the line of the intestate's paternal uncles and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncles and aunts, and their descendants, unless there should be kindred lineal or collateral, who, either in right of propinquity, or by right of representation, stand in a nearer relation to the intestate than the uncles and aunts, in which case, such nearer kindred would take the inheritance to the exclusion of both of these collateral lines, and in their hands it would become an ancestral estate, and afterward go in the blood of the relative from whence it came, in the ordinary course of descent prescribed for ancestral inheritances.

Sixth—That, when the inheritance is fixed by these facts in any given line, it will pursue that line until it becomes extinct, and the objects of bounty, and the order in which they succeed one another, and the proportion they take, are to be ascertained by the first section, which is to be considered as the general table of descent. The father, mother, brothers, sisters, and so on, mentioned in the section, are those who are to be considered when counting from any propositus, whether the propositus of a single line only, or the concurrent propositus of both lines, as the intestate is as to personal property."

Section 2533 of said chapter provides as follows:

"Relations of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as descendants of the whole blood, unless the inheritance come to the intestate by descent, devise or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance."

Section 2543 thereof provides as follows:

"The expression used in this Act, 'where the estate shall have come to the intestate on the part of the father,' or, 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent."

In section 2541, the word "inheritance" is defined in said statute as follows:

> "The term 'inheritance,' as used in this Act, shall be understood to mean real estate, as herein defined, descended according to the provisions of this Act."

And in Section 2540, the words "real estate" are also defined as follows:

> "The term 'real estate,' as used in this Act, shall be construed to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of the intestate, seized or possessed thereof in any manner, other than by lease for years and estates for the life of another person."

Thus, we have an ancestral estate defined by the statute itself to be an inheritance (as also therein defined), which "shall have come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent."

Thus, an ancestral estate is, under this statute, so enlarged that it not only includes inheritances derived to the intestate under the laws of *descent*, as at common law, but likewise those arising by gift or devise from some parent, or from some relative of the blood of such parent. This provision, taken as a whole, is purely statutory, but it defines an ancestral estate under said Chapter 49, and emphatically provides the final disposition of such estate, as distinguished from other estates also provided in

said chapter. And it will be observed from the very terms of the statute itself that, in order for any inheritance to be or become an ancestral estate, it must come to the intestate from some parent or blood relative of such parent, either by *descent, devise* or *gift*. It must arise from one of these three sources, for it cannot possibly arise from any other. Of course, all other estates as therein defined which do not fall within the three provisions, must necessarily fall outside of them, and when so, they become new acquisitions, and not ancestral estates. And, so careful was the Legislature of Arkansas in passing this law of descent, that such estates should be ancestral, and thereby go back to the source from whence they came, on the death of the owner thereof, intestate and without issue, that by its provisions it made a will for each and every such person, and steadfastly guarded the ancestor and his blood relatives by providing that such estate must revert to them, excluding even the half-bloods who are not of the blood of that ancestor from whom the estate came by gift, devise or descent. This was the common law provision, except only estates by *descent* went back to the ancestor.

In discussing this statute in the case of *Kelly's Heirs* v. *McGuire, et al.*, the learned Judge, in delivering his opinion, observed:

> "The transmission of property, whether by descent, succession, or purchase, depends upon the municipal regulations of each state, and no

> duty more delicate can be imposed on courts of justice, than to pass upon and enforce these regulations. It is for the judiciary to construe, not to legislate, and when the real intention of the lawmaker is ascertained, it must be declared, regardless of consequence. If cases are omitted, which ought to have been included, or hardships arise not foreseen, the remedy for the evil rests in the wisdom and discretion of another department. For us, it is sufficient to know, *ita lex scripta.*"

Let this expression and declaration of judicial functions be remembered, for it is the law on that feature of any statute, and is here expressly so applied to the statute under consideration. But in the case of *Shulthis* v. *McDougal*, 170 Fed. 529, that court sought to go outside of this statute, and based its decision on such extraneous matters as therein pointed out. We mention this fact far in advance of discussing that case, because the principle of law above referred to in this opinion of the Supreme Court of Arkansas is universal, and binding on all courts, and whenever a court deserts its own province and invades that of the legislative department, and seeks to supply omissions, or provide for conditions not provided for in the statute under which the subject matter before it arises, or goes contrary to the express provisions of such statute, the decision of that court is not binding on any one or any other court—the judiciary cannot legislate, or by a

voluntary attempt, create statutory provisions which thereby become binding upon the general public.

On page 586, the Supreme Court of Arkansas further observes:

> "We now pass to the more particular consideration of the Tenth Section (being Section 2531, hereinbefore set forth).
>
> The manifest intention of the first part of this section, was to preserve ancestral estates in the line of the blood from whence they came. It was a partial adoption or recognition of the common law principle, which invariably followed the line of the blood. If the estate come to the intestate by the father, or as it may be differently, and as well expressed, on the part of the father, then it must ascend to the father and his heirs, and thus overturn the inflexible rule of the common law, that an estate could never ascend, but should rather escheat to the lord. And so, if it comes by or on the part of the mother, it goes to the mother and her heirs, in exclusion of the heirs of the father. In other words, it remains in the paternal or maternal line from whence it was derived.
>
> The expression, 'come by the father,' or 'mother,' or on 'the part of the father,' or 'mother,' means the same thing. *Maffit* v. *Clark*, 6 Walts & Serg. 260. They are familiar to, and derived from, the common law, having an appropriate, technical meaning, which we must suppose the Legislature intended to adopt. They embrace not only the father, but all of the ancestors of the father, both paternal and maternal. Co. Litt. 12 a. Whenever, says Lord COKE, lands do descend from the part of the mother, the heirs of the part of the father shall

never inherit. And, likewise, when the lands descend from the part of the father, the heirs of the part of the mother shall never inherit. Co. Litt. 13 a.

The 10th and 22nd (Secs. 2531 and 2543) Sections must be construed together, although the exact expressions used in the latter are not contained in any part of the statute. But words of equivalent signification are employed, and they are embraced within the spirit of the 22nd Section. Any other exposition would render the section entirely nugatory, and we must so construe statutes as that every part may have its proper effect, if possible.

The expression, then, 'come by the father, or mother,' is not limited to an estate acquired by descent merely, but includes an estate by gift, devise, or descent from the parent referred to, or from any relation of the blood of such parent. Such is the letter and spirit of the statute. In other words, there are two classes of cases provided for; one, where the blood of the person, from whom the estate came, whether it be by descent, devise or gift, is regarded; and the other, where the blood of the intestate form the *stirpes*, or stock descent, without respect to ancestral blood.

Chancellor KENT says there is a difference in the laws of the several states between the succession to estates, which the intestate had acquired, in the course of descent, or by purchase. 'If the inheritance,' says he, 'was ancestral, and came to the intestate by gift, descent or devise, it passed to the *kindred* who are of the *blood of the ancestor from whom it came*, whether in the paternal or maternal line.' 4 Kent, 404.

The portion of the 10th Section, as to *new acquisitions*, gives the father and mother a life estate only, with remainder to the collateral heirs of the intestate, such as brothers and sisters, and their descendants, and so on. A new acquisition, or newly acquired estate, does not afford, of itself, an exact idea of the mode of acquisition. By the common law, there were two modes of acquiring an estate—distinguished by general appellations of descent and purchase. In the first, it was by operation of law; and in the second, by act or agreement of the parties. Devises and gifts fell in the latter class. An estate by purchase there became inheritable to the heirs general of the purchaser, first, of the paternal, and then of the maternal line. 2 Bl. Com. 243.

It must be understood, however, that a new acquisition in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry (*Brewster* v. *Benedict*, 14 Ohio 385), or by will or deed from a stranger. In other words, it is an estate derived from any source other than descent, devise or gift, from father or mother, or any relative in the paternal or maternal line. *Butler* v. *King*, 2 Yerg. 116.

If the son should purchase land from his father or mother for a valuable consideration, it would be a new acquisition, and descend as such; because nothing is received by way of bounty at the hands of ancestors, which is the case as to lands descended from, or devised, or given by them to the intestate, and it was thought reasonable that they should remain in the blood from which they came.

Land is to be considered as having come from, or by, or on the part of, the father or

mother, when it comes by gift, devise or descent, either immediately from them, or from any person in their respective lines. *Shippen* v. *Isard*, 1 Serg. & Rawle, 223."

The rules enunciated in the opinion in the above case as to the law of descent and distribution of the State of Arkansas have always been adhered to by that court ever after the rendition of that decision, as may be seen by the following cases: *Loftis* v. *Gass*, 15 Ark. 680; *Scull* v. *Vaughne*, 15 Ark. 695; *Galloway* v. *Robinson*, 19 Ark. 396; *Bird* v. *Lipscomb*, 20 Ark. 19; *Moss* v. *Ashbrook*, 20 Ark. 128; *Campbell* v. *Ware*, 27 Ark. 65; *Beard* v. *Mosely*, 30 Ark. 519; *Magness* v. *Arnold*, 31 Ark. 103; *Boseman* v. *Browning*, 31 Ark. 376; *Oliver* v. *Vance*, 34 Ark. 564; and *Kountz* v. *Davis*, 34 Ark. 596; and *Hogan* v. *Findley*, 52 Ark. 55.

In *Campbell* v. *Ware*, it was held:

"When the inheritance is ancestral and came from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion of the mother's line; and so, on the other hand, if it came from the mother's side, then to the line on the part of the mother from whence it came, to the exclusion of the father's line."

In *Beard* v. *Mosely*, it was held:

"When a child inherits land from its father, and dies without issue, the land will go to the line on the part of the father, to the exclusion of the mother's line."

In *Oliver* v. *Vance*, it was held:

"The rules of descent educed from the statute and then formulated, in the case of *Kelly's Heirs* v. *McGuire, et al.*, 15 Ark. 555, have become rules of *property*, to be *disturbed only by the Legislature*. (Italics are ours.) Real property given by a paternal uncle is ancestral, as if it came from the father; and upon the death of the donee, intestate, it will descend to his nearest relations who are of the blood of the donor, to the exclusion of those who are not of his blood. The donee, or person last entitled to possession, and not the donor, remains the *propositus*, whose nearest relations of the donor's blood must be traced for heirs."

In *West et al.* v. *Williams et al.*, 15 Ark. 682, the court held:

"Where lands are devised by a maternal ancestor, the devisee, though he acquires the lands by purchase, holds them as an ancestral estate *ex parte materna;* and upon his death, without issue, those only of his heirs who are of the blood of such maternal ancestor, can inherit. *Kelly's Heirs* v. *McGuire et al.*"

In *Kountz* v. *Davis*, 34 Ark. 596, the court observes:

"Upon the death of Jesse, his father took a life estate in his part of the lands, and his brothers and sisters the remainder in fee; and upon the death of the child of William, its part having come by its father, ascended to its grandfather and grandmother, and uncles and aunts on its father's side, in equal parts in fee. *Kelly's Heirs* v. *McGuire et al.*, 15 Ark. 555; *West*

v. *Williams*, Id. 682; *Campbell* v. *Ware*, 27 Ark. 65; *Beard* v. *Mosely et al.*, 30 Ark. 517; *Oliver* v. *Vance, Jr., ante.*"

In *Coleridge* v. *Burke*, 69 Ark. 237, where the grandfather devised lands to his granddaughter, who died without issue, it was held that such lands descended to the heirs of the grandfather in preference to the next of kin of the intestate.

We presume that, for the purpose of this suit, at least, the above decisions and authority are amply sufficient to determine an ancestral estate both at common law and as it exists under Chapter 49 of the Statutes of Arkansas, which must govern this case. And from such it will be observed that an ancestral estate, under this chapter, of an inheritance derived by descent, devise or gift from some ancestor, and upon the death of the intestate without issue or their descendants, the lands go back to that ancestor, if living, and if not, to his heirs who are of the blood of the ancestor, etc. It will also be further observed that if such inheritance came from the paternal side, it reverts to that side in preference and exclusion of the maternal side, and goes on to ultimate extinction of the paternal heirs. If from the maternal side, it takes that line in the same manner; and in each instance the descent never crosses from one line to the other, as long as there is an heir of the line of its origin to take the inheritance.

We will next inquire: What is a new acquisition? This has, to some extent, been incidentally defined in the cases cited on the other branch, and need not be repeated. But as this case of *Kelly's Heirs* v. *McGuire* is the leading case in construing and defining these two terms thus used in said statute, and by which we are ever to be governed, it will not be amiss here to repeat that definition of a new acquisition, which is as follows:

> "It must be understood, however, that a new acquisition, in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry (*Brewster* v. *Benedict*, 14 Ohio 385), or by will or deed from a stranger. In other words, it is an estate derived from any source other than descent, devise or gift, from father, or mother, or any relative in the paternal or maternal line. *Butler* v. *King*, 2 Yerg. 116."

The decision further says:

> "If the son should purchase land from the father or mother, for a valuable consideration, it would be a new acquisition, and descend as such; because nothing is received by way of bounty at the hands of ancestors, which is the case as to lands descended from, or devised, or given by them to the intestate, and it was thought reasonable that they should remain in the blood from which they came."

In the case of *Galloway* v. *Robinson*, 19 Ark. 396, the father purchased a tract of land, paid the consideration thereof, but took the deed in the name

of his son, who afterwards died intestate and without issue. It was there held by said court that the father took the fee in said lands, because it came to the son "on the part of the father" by gift, and was not a new acquisition under the statute.

In *Hogan* v. *Findley*, 52 Ark. 55, public lands of said state were taken up in the name of Thomas V. Taylor, an infant, the father of said infant paying the entry fees incident to taking up said lands. Afterward said infant died without issue; whereupon the father made a will, by which he devised said lands to his daughter, and died. The daughter brought an action of ejectment to recover said lands. It was there held that such lands were a new acquisition, and under said statute passed to the father for life, with the fee in the brothers and sisters of said minor. The syllabus in that case is as follows:

> "Where, under the statute found in English's Digest, Chap. 97, Art. 1a, and the Act of Dec. 12, 1850, amendatory thereof, lands were donated by the state to a minor, it was a new acquisition by him within the meaning of the statute of descents (Mansfield's Digest, Sec. 2522), although his father paid the fees necessary to obtain the deed, and on his dying intestate and without issue, it descended first to his father and then to his mother for life. In such case, no interest in the land can be devised by the father, and on his death the sister of the deceased cannot maintain ejectment for it without proving the death of the mother."

The case of *Magness* v. *Arnold*, 31 Ark. 103, is still a stronger case, and point 2 of the syllabus is as follows:

> "Where one dies without issue, seized of a new acquisition, the mother, being the sole surviving parent, takes an estate for life, with remainder, first to the line of the paternal ancestor in postponement to the maternal line, until the former becomes extinct, and then to the maternal line."

In discussing that case, the Supreme Court of Arkansas observes:

> "Referring to the evidence, we find that one Jonathan Magness, by his first marriage, had several children, among whom was his son, Morgan Magness, with whom he resided in poverty until his death in 1834. He had been married a second time, and left his wife, Rebecca, his survivor, who, in the month of December, 1834, had a child, Mary Ann, to whom, on the 16th of August, 1838, a patent was issued for the lands in dispute. The patent was issued upon a certificate of pre-emption granted to occupants and cultivators of the public lands, under an Act of Congress of 1820. It is recited in the patent that the certificate of pre-emption was deposited in the land office of the United States by Mary Ann Magness, who had made full payment for the land. If such was the case, then the land was a new acquisition. If, however, the pre-emption right was her father's, by virtue of his occupancy and cultivation, and the purchase money paid by him, or with the money of his estate after his death, then a question would arise, whether Mary Ann did not hold by

descent, even though the patent may have been issued in her name. The fact is, that she was only about three and a half years of age when the patent was issued, and was, consequently, not the head of a family, or one who could have made the necessary residence and cultivation to entitle her to a pre-emption, nor, in fact, have paid the purchase money. But, however that may be, if held as a new acquisition, upon her death her surviving parent only acquired a life estate in the land. Such is the express provisions of our statute of descents, and such the decision of this court in the case of *Kelly's Heirs* v. *McGuire and Wife*, 15 Ark. 555. In that case our statute of descents was considered, and it was there held: That if the estate was ancestral, and come from the father's side, it went to the line from whence it came, not in postponement, but in exclusion of the mother's line; or if from the mother's side, then to the line of the mother. But if not ancestral, and a new acquisition, after a life estate reserved in succession to the father and mother, if alive, it will go in remainder, first, to the line of the intestate's paternal uncles and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct, and then in like manner to the mother's line.

In the case under consideration, the father, being dead, the mother took a life estate in the land in controversy, and at her death it would go to the nearest relations on the father's side (if any).

Mary Ann died intestate and without issue. Morgan Magness, under whom the defendant claims title, being a half-brother on the father's side, had either an absolute or joint

estate in the land, dependent upon the fact as to whether there were other children and heirs of the first marriage."

In the case of *Kountz* v. *Davis*, 34 Ark. 590, two brothers, J. and W., purchased a tract of land which they held jointly. J. died, leaving him surviving his father and mother and brothers and sisters. Afterward, W. died, leaving a child, and soon after the child died, without issue, leaving its grandfather and grandmother and uncles and aunts on its father's side. *Held*, that, upon the death of J., his interest in the lands descended to his father for life, remainder in fee to his brothers and sisters; and upon the death of the child, its interest in the land ascended to its grandfather and grandmother, and uncles and aunts on the grandfather's side in equal parts.

I presume these will suffice on the subject of ancestral estate and new acquisitions, as provided for in the laws of descent of said state. From these decisions and the authority we have cited, it will be observed that, in order for an inheritance to be ancestral, it must come from some ancestor; and the way and manner of its coming must be by descent, devise or gift from that ancestor; and that on the death of the intestate without issue that inheritance goes back to that ancestor, if living, and if not, then to the nearest relative of the *blood* of that ancestor. It will also be observed that in ancestral estates,

the intestate upon whom the inheritance is cast by gift, descent or devise, must always be of the blood of the ancestor, otherwise, in case of gift or devise, the inheritance becomes a new acquisition and passes to the relative of the intestate—not the ancestor—according to the law of descent extant at the time of his death.

It will be further observed that every inheritance which comes under the provisions of Chapter 49 of the Statutes of Arkansas, as shown in Mansfield's Digest of 1884 (which is the law under which this case arose, and by which it must be governed), must fall under the provisions therein provided for an ancestral estate, or a new acquisition. It must come within the purview of the one or the other, for there is no other class of inheritances provided for, either in said statute or by the common law. As we have already said, the common law ancestral estates have been enlarged under this statute so as to include not only estates which came from some ancestor by *descent* as at common law, but likewise includes estates which come to the intestate from such ancestor by *devise* or *gift*. There is this much of an innovation upon the common law under the provisions of this statute. But no matter. All inheritances thereunder must come within the provisions of the one class or the other, and must be governed by the rules and principles laid down in said statute, and thus proclaimed by the Supreme Court of that state. There is no middle ground between the two

divisions under this statute, nor is there any vacant space outside. Every estate arising under this law of descent, or within the jurisdiction over which this statute is extended, must come within its provisions, and fall within the one class or the other, and be governed by the rules and principles governing the class in which it falls. From the above citations of decisions of that state, it will be observed that a great variety of estates, or estates under different conditions, have arisen, and as to which said statute has been construed by that court, but in each instance the estate had been classed in the one division or the other, and some times the two classes of estates have met in the same estate, as in *Kountz* v. *Davis*, above cited; but even then this line of demarcation has been rigidly adhered to, and the estates and parts of estates decreed accordingly.

I presume that had the lands in controversy in this suit been situated in the State of Arkansas, instead of in Indian Territory, no one would have been so bold as to have sacrificed his reputation as a lawyer by advocating that, in the case at bar, the father or mother of Waitie Washington inherit such lands under this statute, to the exclusion of his brothers and sisters. And I presume, also, no one would maintain for a moment that lands were not a new acquisition, and descended under the provisions of Section 2531 of said chapter as therein provided, going in succession, first, to the father for life, then to the mother, with the remainder in fee to the brothers

and sisters of said Waitie. Then why should there be any difference in the descent of said lands, simply because they happened to be situated in Indian Territory instead of the State of Arkansas, whose statute of descent was in force in said Territory at the time of his death? No reason, rule or principle of law will permit a different construction or line of decisions by the court of said Territory, or those having jurisdiction over such matters, from the decisions of said state, unless there is some power unknown to us by which such courts can breathe into said statute a newness of life which said chapter never had before, and which were never discovered by the courts of its origin. If such power existed, whence cometh it, and to what origin or authority can we trace its wonderful creation? And, too, on what basic principle, in the face of these authorities and decisions, can such a power or authority subsist and crystalize itself into law which is binding on this or any other court? These questions must be answered by the learned counsel for the defendants in error, and that power discovered and its force and efficacy applied to the case at bar, before they can withstand the decisions of said state and the general law applicable to the case, or give them a creditable standing before this or any other court on the matters involved in this suit. If Chapter 49 of said statutes comprehends only the two classifications of estates, namely, ancestral and new acquisition, then it is not in the power of any court, State

or Federal, to create others, for, as said by the Supreme Court of Arkansas in said case of *Kelly's Heirs* v. *McGuire et al.*, 15 Ark. 555, as shown by the above quoted portion of said opinion, it is the province of courts to construe the law, not to legislate. That same principle was closely adhered to and openly recognized by said state court in the case of *Huston* v. *Scott*, 20 Ok. page 157, where it was therein urged by learned counsel that the statutes under consideration had outlived their usefulness and were only historic relics of bygone days. But still, this court refused to depart from this universal principle, and applied the statutes as they were found on the statute books and as construed by other courts. Every judiciary in the United States owes its existence to some Legislative Act, *Ogden* v. *Saunders*, 12 Wheat. 213; *Jacoway, Admr.*, v. *Denton*, 25 Ark. 649; and where the Legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be *legislating to do so*. *French* v. *Spencer*, 21 How. 228; *Maxwell* v. *Moore*, 22 How. 191, 16 L. ed. 251.

In *Atkins* v. *Fiber Disintegrating Co.*, 18 Wall. 272, 21 L. ed. 844, this court observed: "The intention of the lawmaker constitutes the law. *U. S.* v. *Freeman*, 3 How. 563. A thing may be within the letter of a statute, and not within its meaning, or within its meaning, though not within its letters, *Slater* v. *Clave*, 3 Ohio St. 85; 7 Bac. Abr. tit. Stat.

1, 2, 3, 5. In cases admitting of doubt the intention of the lawmaker is to be sought in the entire context of the section, statutes or series of statutes *in pari materia*. *Patterson* v. *Winn*, 11 Wheat. 389; *Dubois* v. *McLean*, 4 McLean 489; 1 Cooley, Black, 59; *Doe* v. *Brandling*, 7 Barn & C. 643; *Stwel* v. *Zouch*, Plowd. 365." See, also, *Jones* v. *N. Y. Guaranty and Indemnity Co.*, 25 L. ed. page 1034, to the same effect. And "A Legislative Act is to be interpreted according to the intention of the Legislature apparent upon its face. Every technical rule as to the construction of particular terms, must yield to the clear expression of the paramount will of the Legislature," *Wilkinson* v. *Leland et al.*, 7 L. ed. 543. But "where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction," *Thornley* v. *U. S.*, 113 U. S. 310, ... L. ed. 999; *Lake County* v. *Rollins*, 130 U. S. 28, 662, 32 L. ed. 1060; and *St. Paul, Minn. & Man. R. R.* v. *Phelps*, 137 U. S. 528, 34 L. ed. 767, point 4. Nor will courts give construction to an Act of Congress where the words are unambiguous and the intent is plain, *Dewey* v. *U. S.*, 178 U. S. 510, 44 L. ed. 1174; but will give effect to the will of Congress as thus plainly expressed,

Not only this, but, as will be seen by the following decisions, it is a well known principle of law that where one state or the Congress of the United

States adopts the statute of another state, it likewise adopts, as part of that statute, the interpretation thereof given it by the court of last resort of that state from which the adopted statute was thus taken. If this proposition of law be correct, then it follows as an irresistable conclusion that the construction and interpretation given Chapter 49 of the Statutes of Arkansas, prior to the adoption thereof by Congress, is binding not only on this court, but likewise upon every other court, both state and federal. To this effect, see *Robinson & Co.* v. *Belt*, 79 U. S. . . ., 19 L. ed. . . .

The case of *Hardenberg* v. *Ray*, 151 U. S. 123, 38 L. ed. 93, was a contest over a will, arising under a statute of Oregon, which in turn had been adopted from the State of Missouri, whose statute, in part, had been taken from Virginia. The Supreme Court of the United States in that case held:

> *(4)* "The Act of 1849, of Oregon Territory, adopted from the State of Missouri (and since re-enacted), as construed by the decisions of the Supreme Court of Missouri, and approved by the Supreme Court of Oregon, confers testamentary power to devise after acquired real estate."

The case of *Henriette Mining, Etc. Co.* v. *Gardner*, 173 U. S. 130, 43 L. ed. 637, involved an attachment under a statute of Arizona which had been adopted from California, and it was therein held:

(3) "A statute taken from another state will be presumed to be taken with the meaning it had there."

In *Stutzman Co.* v. *Wallace*, 142 U. S. 293, 35 L. ed. 1022, the Supreme Court of the United States, Justice FULLER delivering the opinion, observed:

> "It is well settled that, upon the construction of the constitution and laws of a state, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the federal Constitution or of the federal statute, or a rule of general commercial law. *Norton* v. *Shelby County*, 118 U. S. 425 (30:178, 184); *Gormley* v. *Clark*, 134 U. S. 338, 348 (33:909, 913)."

As far back as 1825, this principle was recognized by this court wherein Chief Justice MARSHALL, in *Elmendorf* v. *Taylor et al.*, 10 Wheat. 31, 6 L. ed. 292, observed:

> "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the Legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or any

other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States, is received as the true construction by all; and on the same principle, the construction by the courts of the several states of the legislative acts of those states, is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

And in a foot note to that case, it is observed:

"In determining questions as to title to property, the federal courts are bound to apply the laws and rules of property of the state in which the property is situated, and to decide the controversy as the state court would. *Walker* v. *State Com.*, 17 Wall. 648; *State* v. *The Swallow*, 1 Bond. 189; *Supervisors* v. *U. S.*, 18 Wall. 71; *Coolridge* v. *Curtis*, 1 Bond. 222; *Simms* v. *Irvine*, 3 Dall. 425; *Waring* v. *Jackson*, 1 Pet. 570; *Davis* v. *Mason*, 1 Pet. 503; *Bk. of Hamilton* v. *Dudley*, 2 Pet. 492; *Hinde* v. *Vatter*, 5 Pet. 398; *Clark* v. *Smith*, 13 Pet. 195; *Wilcox* v. *Jackson*, 13 Pet. 498; *Amis* v. *Smith*, 16 Pet. 303; *Fisher* v. *Haldeman*, 20 How. 186; *Miles* v. *Caldwell*, 2 Wall. 35; *Bayerque* v. *Cohen*, 2 McAll. 113; *New Eng. S. C.* v. *Bliven*, 3 Blatch. 240; *Sundam* v. *Williamson*, 24 How.

427; *Chicago* v. *Robbins*, 2 Black. 418; *Ross* v. *Duvall*, 13 Pet. 45; *Society* v. *Wheeler*, 2 Gall. 105; *Brine* v. *Ins. Co.*, 6 Otto 627; *Orvis* v. *Powell*, 8 Otto 176."

It is also true that where the statutes of a foreign country are adopted, the construction and interpretation of those statutes made by the courts of that country, prior to such adoption, are taken and received as parts of such statutes by the state or country thus adopting them, as may be seen from the following decisions: *Pennock* v. *Dialogue*, 2 Pet. 18, 7 L. ed. 327; *Catchcart* v. *Robinson*, 5 Pet. 280, 8 L. ed. 120; *McDonald* v. *Hovey*, 110 U. S. 628, 28 L. ed. 269; and *Brown* v. *Walker*, 161 U. S. 600, 40 L. ed. 822, where it is observed by Justice Brown, who delivered the opinion in that case, when speaking of the construction of the laws and statutes there involved:

> "As the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to these principles by the English courts is cogent evidence of what they designed to secure and of the limitations that should be put on them. This is but another application of the familiar rule that, where one state adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the state from which they are taken. *Cathart*

v. *Robinson*, 30 U. S. 5 Pet. 264, 280 (8:120, 226); *McDonald* v. *Hovey*, 110 U. S. 619 (28:269)."

It is also a rule of the courts of the United States that where the construction given by the court of last resort of a state to the constitution and laws of that state has been uniform and settled, such construction and interpretation is binding on the courts of the United States as a rule of decision. *Webster* v. *Cooper*, 14 How. 488, 14 L. ed. 510; *Marshall* v. *Ladd*, 19 L. ed. 153, where it is held by this court that "error in state court in construing state statute, cannot be reviewed in this court;" *Massingil* v. *Downs*, 7 How. 760, 12 L. ed. 906; *Nesmith* v. *Sheldon*, 7 How. 812, 12 L. ed. 925, where the court held: "The Supreme Court of Michigan has so construed its constitution, and it is the established doctrine of this court, that it will adopt and follow the decisions of the state courts in the construction of their own statutes, where that construction has been settled by the decision of their highest judicial tribunal;" *Gilman* v. *Sheboygan*, 2 Black. 510, 17 L. ed. 305, where that court observed: "This court considers itself bound in cases like this, to follow the settled adjudications of the highest state court, giving constructions to the constitution and laws of the state; *East Oakland Twn.* v. *Skinner*, 94 U. S. 255, 24 L. ed. 125; *Adams* v. *Nashville*, 95 U. S. 19, 24 L. ed. 369, where the court observed: "This court is bound to respect a decision of a state tribunal

upon the construction of its own statutes;" *Enfield* v. *Jordan*, 119 U. S. 680, 30 L. ed. 523; *Louisville* v. *N. O. & T. R. Co.*, (Miss.) 133 U. S. 587, 33 L. ed. 784; *Cook County* v. *Calumet & C. Canal & Dock Co.*, 138 U. S. 635, 34 L. ed. 1110; *McElvane* v. *Brush*, 142 U. S. 155, 35 L. ed. 971, point 5, where the court said: "This court follows the adjudication of the highest court of a state in the construction of its own statutes;" and *Miller* v. *Anderson (Miller* v. *Swann)*, 150 U. S. 132, 37 L. ed. 1028, point 1, wherein the court observed, "The construction of a state statute is a matter for the state court, and its determination thereof is binding on this court." See, also, *Louisiana ex rel. Southern Bank* v. *Pilsbury*, 105 U. S. 278, 26 L. ed. 1090.

Not only this, but the construction given to the statute of a state by the highest court of that state, is regarded as a part of that statute, and is as binding as the text upon the courts of the United States, *Leffingwell* v. *Warren*, 2 Black. 599, 17 L. ed. 261, where the Supreme Court of the United States held that: "The construction given to a statute of a state by the highest judicial tribunal of that state, is regarded as a part of the statute, and is as binding as the text upon the courts of the United States;" *Aicardi* v. *Alabama*, 19 Wall. 635, 22 L. ed. 215, where the court held: "A construction of a state statute by the Supreme Court of the state, is authority in this court;" *Stone* v. *Wisconsin*, 94 U. S. 181, 24 L. ed. 102; *Adams* v. *Nashville*, 95 U. S. 19,

24 L. ed. 369; *Chicago, etc.*, v. *Minnesota, etc.*, 134 U. S. 418, 33 L. ed. 970, point 6; *Morley* v. *Lake Shore, etc., R. R.*, 146 U. S. 162, 36 L. ed. 925, point 1, where it is held: "The meaning of a state statute, declared by the highest court of a state, is *conclusive upon this court; Baltimore Traction Co.* v. *Baltimore Belt R. R.*, 151 U. S. 137, 38 L. ed. 102, point 1, where it is held: "This court is bound to accept the conclusion of the state court as to the proper construction of the statutes of the state;" *First Nat. Bank* v. *Ayers*, 160 U. S. 660, 40 L. ed. 573, point 1, where it is held: "This court is bound by the interpretation given to a state statute by the Supreme Court of that state;" *First Nat. Bank* v. *Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, point 1, where it is held: "This court is bound by the judgment of the Supreme Court of a state in the mere matter of the construction of a state law;" *Nobles* v. *Georgia*, 168 U. S. 398, 42 L. ed. 515; *Fairfield* v. *Gallatin County*, 100 U. S. 47, 25 L. ed. 544, where it is held "*(3)* This court will adopt and follow the decisions of the state courts in the construction of their own constitution and statutes;" *Douglass* v. *Pike County*, 101 U. S. 677, 25 L. ed. 968; and *Forsyth* v. *Hammond*, 166 U. S. 506, 41 L. ed. 1100, where Justice Brewer, in delivering the opinion, observed: "The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the Supreme Court of a state has misconstrued its constitution

or its statutes, but we are not at liberty to therefore set aside its judgments. This court is the final arbiter as to such questions," citing a long line of decisions of that court, among which are several above given.

These same rules and principles are made applicable and govern the decisions of the federal courts where Congress itself has adopted state statutes and put them in force in territories under its own jurisdiction. In *Willis* v. *Eastern Trust & Banking Co.*, (1897) 169 U. S. 307, 42 L. ed. 752, point 3, the Supreme Court of the United States held:

> "Where an Act of Congress has been taken from a state statute, the known and settled construction which such statute has received in the state before the original enactment of the Act of Congress, must be considered as having been adopted by Congress with the text thus expounded;"

and in discussing that case, that court further observed:

> "The resemblance between the provisions of the Massachusetts Statute of 1860, and of the Act of Congress of 1864 is so remarkable, that it is evident that the latter were taken from the former. This being so, the known and settled construction which those statutes had received in Massachusetts before the original enactment of the Act of Congress, must be considered as having been adopted by Congress with the text thus expounded. *Tucker* v. *Oxley*, 9 U. S. 5 Cranch, 34, 42 (3:29, 31); *Pennock* v.

Dialogue, 27 U. S. 2 Pet. 1, 18 (7:327, 333); *Metropolitan Railroad Co.* v. *Moore*, 121 U. S. 558, 572 (30:1022, 1026); *Warner* v. *Texas & Pacific Railroad Co.*, 164 U. S. 418, 423 (41:495, 500). In *Metropolitan Railroad Co.* v. *Moore*, just cited, where provisions of Statutes of New York, *regulating judicial procedure* (italics are ours), had been incorporated by Congress, is substantially the same language in the legislation concerning the District of Columbia, it was held that Congress must be presumed to have adopted those provisions as then understood in New York and already construed by the courts of that state, and not as affected by the previous practice in Maryland or in the courts of the District of Columbia."

Here are cases last cited, where not only the substantive, but likewise the adjective, law adopted by Congress from a state were thus held to be governed and determined by the former construction of the state courts from which such statutes had been taken; and, too, that such construction was binding on the Supreme Court of the United States. Thus, we have the invariable rule, promulgated by the court of last resort of this nation, and also other courts of last resort, that where a state statute free from violation of the Constitution, laws and treaties of the United States, has been adopted by another state, the Congress of the United States, or some foreign country, the prior interpretation and construction of that statute by the highest judicial tribunal of the mother state or country is binding

upon the adopting state or country and all courts thereof, and the same is taken, held and construed to be a part of the statute itself, and as binding on such courts as the text itself.

It then follows as an irresistible conclusion, that when Congress adopted these Statutes of Arkansas, by putting them in force in Indian Territory, such statutes thus adopted became operative under such adoption in said Territory, as far as thus put in force at all, with the interpretation and construction of the same, which had previously been determined and enunciated by the Supreme Court of Arkansas. Among such adopted statutes is Chapter 49, which relates to the laws of descent and distribution of that state, and which, as shown by the numerous decisions above cited from that state, had received full and complete interpretations and constructions long before such adoption. Such interpretation had long been acquiesced in and become the settled construction of that chapter, before it was thus put in force in said Territory, and the same is now, and forever will be, the rule by which such statutes must be followed in determining the rights of those falling under this chapter, while the same was in force in said Territory.

Then, under the force and efficacy of these decisions, and the rule thus unalterably established, we might consistently ask, what great weight is to be given to this decision of the Eighth Circuit Court

of Appeals proclaimed in the case of *Shulthis* v. *McDougal et al.*, 170 Fed. 529?

Let us call the attention of this court to the significant fact, that on different occasions that court itself followed this well known rule of construction proclaimed in these numerous decisions we have cited, in relation to the force, effect and construction of the very statutes thus put in force in said Territory by said Acts of Congress.

In *Sanger* v. *Flow*, 48 Fed. 152, point 4, this same Circuit Court of Appeals held:

> "Since Act Cong. May 2, 1890 (26 U. S. St. c. 182, Section 31), adopts and puts in force in Indian Territory the body of the statutes of the State of Arkansas, it will be presumed that the construction and interpretation placed on these statutes by the Supreme Court of the state prior thereto were adopted at the same time."

And in *Apollos et al.* v. *Brady et al.*, 49 Fed. 401, point 1, that same court again held:

> "In construing the Statutes of Arkansas which were extended over the Indian Territory by Act of Cong. May 2, 1890, the federal courts will follow the decisions of the Supreme Court of that state."

Thus, by these decisions, that court had proclaimed its policy on this statute, which was in perfect accord with the well known and established rule of construing adopted statutes, and in perfect harmony with this whole line of decisions; but in the

case of *Shulthis* v. *McDougal et al.*, it proceeded on an entirely different and independent rule, one, in fact, at variance with this universal rule of interpretation. The burden, therefore, of sustaining that decision in the face of these rules and principles established by the Supreme Court of the United States to the contrary, will be on the defendants in error in this case.

Then, again, in the case of *National Live Stock Commission Co.* v. *Talliferro et al.*, 20 Okla. 177, the court also held:

> "It will be presumed that Congress, in adopting the Statutes of Arkansas for the Indian Territory, adopted them with the construction and interpretation that had been placed on them by the Supreme Court of Arkansas prior to their adoption by Congress" (citing as authority *Sanger* v. *Flow*, 48 Fed. 152; *Apollos* v. *Brady et al.*, 49 Fed. 401; *Henriette Mining & Milling Co.* v. *Gardner*, 175 U. S. 123; and *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295).

The same general principle was adhered to by the Supreme Court of Oklahoma Territory in *Randolph* v. *Hudson*, 12 Okla. 528, 529 and 530, and in 162 Fed. 231, the Circuit Court of the United States for the Eastern District of Oklahoma, decided this *Shulthis* case itself, the very reverse of the decision of the Circuit Court of Appeals, and followed the established rules laid down in all such cases, which

decision of the Circuit Court by Judge CAMPBELL we believe to be correct.

In *Zufall* v. *United States*, 1 Indian Ter. Rep. 639, the Court of Appeals of Indian Territory held:

> "The decisions of the Supreme Court of Arkansas upon the statutes of that state, rendered prior to the extension of the statute over the Indian Territory, are binding on the Court of Appeals in the Indian Territory."

In *Hawkins* v. *United States*, 108 Pac. 562, point 12, it was held by the Criminal Court of Appeals of this state that:

> "Act Cong. May 2, 1890, c. 182, 26 Stat. 81, adopting certain general laws of Arkansas, also adopted the construction previously placed upon such laws by the Supreme Court of Arkansas."

And in *State ex rel. Sims* v. *Caruthers*, 1 Okla. Crim. Rep. 428, the same court held:

> "Whenever Congress, in legislating for Indian Territory, borrowed from the statutes of a state provisions which had received in such state a known defined and settled construction before such Act of Congress was passed, that construction should be deemed to have been adopted by the courts over which such legislation extended, and the provisions of such laws should be construed as they were understood at the time in the state from which the same were borrowed."

Here, by the decisions above cited, we have the Court of Appeals of Indian Territory, the Criminal Court of Appeals of this state, the Supreme

Court of this state and the Eighth Circuit Court of Appeals and the Circuit Court of the United States, and also this court, construing these statutes thus put in force in Indian Territory by this Act of Congress and holding that they are each bound by the construction and interpretation thereof given by the Supreme Court of the State of Arkansas before their adoption, and each, in effect, concurring in the opinions and decisions of the other, and, in some instances, one court citing the decision of the other or others as authority. And, too, each court is upheld, and the soundness of its decision is substantiated, by the numerous decisions of the Supreme Court of the United States, above cited, whereby this court has repeatedly held that it also was bound by such constructions and interpretations of adopted statutes by the highest judicial tribunal of the state from which the statute was thus adopted. These cases are specific instances in which the adopted statutes from Arkansas have been called into question, and their force, effect and efficacy construed and determined by these respective courts, and each time each court came to the same conclusion as to such prior construction and interpretation thereof.

Then, what extraordinary power, force or course of reasoning can be brought to bear upon this court by learned counsel for the defendant in error in this case, to induce it to depart from these decisions; and *Robinson & Co.* v. *Belt*, 47 L. ed. 65,

and especially when, we are proud to observe, this court was supported in every particular by these numerous decisions herein cited? We have been unable to find any case other than *Evans-Snider-Buel Co.* v. *McFadden*, 105 Fed. 293, 185 U. S. 505, 46 L. ed. 1012, which have gone from the courts of Indian Territory to this court whereby the effect of such adopted statutes have been construed by this court But why should there be any different construction by the Supreme Court of the United States as to these adopted statutes than from other statutes thus adopted by other states, and even by Congress itself, as heretofore cited? It will be difficult to find one whereby all this array of authority and the decisions of every court of the land are to be overturned and an exception found in this one instance.

Not only this, but the rule of construction and interpretation of Chapter 49 of Arkansas, being the law of Descent and Distribution of that state, was promulgated in 1854 by the Supreme Court of that state, and was ever thereafter closely adhered to, and as late as 1875, that court in *Beard et al.* v. *Mosely et ux.*, 30 Ark. 519, observed:

> "In the case of *Kelly's Heirs* v. *McGuire, et al.*, 15 Ark. 555, the statute of descent and distribution received a full and thorough construction by this court, and which has been the established rule ever since. * * *
>
> The rule in *Kelly's Heirs* v. *McGuire* has been repeatedly affirmed and followed by this court. See *Scull* v. *Vaugine*, 15 Ark. 695; *Bird*

v. *Lipscomb*, 20 Ib. 19; *Galloway* v. *Robinson et al.*, 19 Ib. 396; *Campbell* v. *Ware*, 27 Ib. 65. We still adhere to the rule."

Thus, that construction became a rule of property long before Congress adopted this statute for the first time in 1890, if that act made the same in any sense applicable to real estate in Indian Territory, which, in our judgment, it did not. Congress first put that chapter in force (we believe) as to such real property, on the 27th day of May, 1902, in the Creek Nation, by an appropriation act of said date, but, by a joint resolution of both Houses of Congress, it did not take effect until July 1, 1902, on which day it went into full force in said nation, and so remained until the 8th of August thereafter, and was then supplanted by the Supplemental Creek Treaty, which, in Section 6 thereof, made some modifications as to heirs from what it originally possessed. It then so remained under said Supplemental Treaty until April the 28th, 1904, when Congress again put back in force said statutes thus adopted from the State of Arkansas, from that time until statehood.

So the court will easily observe that said statute had received this construction, and which construction had become a rule of property long before said statutes were ever adopted by Congress, and that such construction and rule of property were adopted along with the statute, and are binding on

every court of the land, both state and federal, even including the Supreme Court of the United States itself, according to the decisions we have cited.

These Statutes of Arkansas thus adopted by Congress became as much the Acts of Congress itself as if they had been enacted by Congress *in hac verba*. *In re Grayson*, (1901) 3 Indian Ter. Rep. 497.

Thus, in construing and applying said adopted statutes, we are dealing directly with the statutes of the Congress of the United States, whose final and ultimate construction and application can be made only by the Supreme Court of the United States, *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 492, 45 L. ed. 1200, where this court observed:

> "Federal statutes must be interpreted by the federal courts independently of local conditions, and cannot be said to have an established meaning, whatever the decisions of other courts may have been, *until they are construed by the Supreme Court of the United States.* (Italics are ours.) And in dealing with such statutes, we must apply the rules and decisions of that court and other courts which are bound by its decisions, in arriving at the meaning of the same."

We do not mean here to convey the notion that anyone has a vested right in a law of descent, nor in an estate which may sometime pass under such laws, but we do mean to say that where a law of

descent has been fully construed and interpreted by the highest judicial tribunal of the state of its origin, and where it is put into operation and universally adhered to by that tribunal ever after until it becomes a rule of property, it is not in the power of *that* tribunal, or any other tribunal, whether that statute is, or is not, adopted by some other state or the Congress of the United States, to so change that law by a different construction and interpretation as to destroy a vested right in lands which descended while that rule and original construction was still in force and effect. To change such a rule, construction and interpretation, requires an enactment of the Legislature having jurisdiction over such matters, and it cannot be done by the Judicial Department whose duty is simply to interpret and construe the laws thus made by the Legislative branch of the state or government. It is too plain for argument that, if after the judiciary had interpreted the statutes, and for years adhered to the same until their decisions became rules of property, they could be permitted to ignore the same and proceed to lay down other and different rules, there would be no limit on their powers to change the laws of the land at will, and divest vested rights, which no tribunal can do, and thus become as despotic in power as the Czar of Russia. Such matters can be changed only by the Legislative department —not by the judiciary.

It will be observed that the Circuit Court of Appeals delivered its decision in *Sango* v. *Flow et al.*, 48 Fed. 152, at the October term, 1891, about one year after said statutes were thus put in force in Indian Territory, and that of *Apollos* v. *Brady*, 49 Fed. 401, in February, 1892; and a third of *Rainwater-Boogher Hat Co.* v. *Malcolm*, 51 Fed. 734, in August, 1892, holding to the same construction and rule thereof promulgated in said other two decisions, and adhering to the construction of such statutes by the Supreme Court of Arkansas. The case of *Shulthis* v *McDougal et al.*, 170 Fed. 529, was rendered on the 3rd day of June, 1909, but by different members of the court from those who rendered said other decisions.

This makes a lapse of nearly eighteen years, which is ample time for establishing a rule of property such as could not be changed by a judicial decision; *Brown* v. *Finley*, 47 So. 577, 21 L. R. A. (N. S.) 679; *Schoonover* v. *Birnbaum*, 148 Cal. 548, 83 Pac. 999, where the Supreme Court of California observed:

> "Decisions of the Supreme Court construing the homestead statutes, which have stood unquestioned and without Legislative change for 10 years, and on the faith of which investments and contracts have presumably been made, will be sustained under the rule of *stare decisis*."

In *Hihn* v. *Curtis et al.*, 31 Cal. 398, the same court held:

"Where a decision of this court was made several years ago affirming the validity of a deed conveying a large amount of real estate, under which decision important rights may have been acquired, the court will not re-examine the grounds of the decision, but on the principle of *stare decisis* will allow it to stand."

In *Bennett* v. *Bennett*, 34 Ala. 53, the Supreme Court of Alabama held that the court would refuse to examine a rule of property regulating descent, etc., established by a judicial decision six years previously. To the same effect are to be found numerous decisions of the various states of the Union and the United States in Sections 336 to 339 of Vol. 13, Cent. Digest.

In 11 Cyc 755, the author observes:

"Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of *stare decisis*, to adhere to such decisions without regard to how it might be inclined to decide if the question was new. And this rule obtains, although the court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled law and rights have vested thereunder, their inherent correctness in the abstract are of less importance than that the rule of property so established should be constant and invariable. So, such a rule controls as to decisions involving

questions of Constitutional law and the construction and operation of statutes" (citing a long line of decisions of the Supreme Court of the various state and federal courts of the Union).

And on page 758, the author again observes:

> "A decision overruling an earlier one is said to relate back to the date of the latter, except so far as the construction last given would impair the obligation of contracts and injuriously affect vested rights,"

again citing another line of decisions to that effect.

The federal courts will follow the decision of the highest court of a state interpreting a statute of the state which involves a rule of property. (1866) *Nichols* v. *Levy*, 72 U. S. 433, 18 L. ed. 596; (1880) *Bondurant* v. *Watson*, 103 U. S. 281, 26 L. ed. 447, where the Supreme Court of the United States observes: "Decisions establishing a rule of real property in a state are binding on this court;" *Waring* v. *Jackson*, 1 Pet. 571, 7 L. ed. 266, where the court held: "It has been the uniform course of this court, with respect to titles to real property, to apply the same rule that is applied by the state tribunals in like cases;" *Butz* v. *City of Muscatine*, 8 Wall. 583, 19 L. ed. 490; *Gage* v. *Pumpelly*, 115 U. S. 462, 29 L. ed. 449, where the court held: "Where the decisions of the highest court of the state established a rule of property, they will, as a rule, be followed by this court;" *Bacon* v. *Northwestern, etc., Co.*, 131 U. S. 264, 33 L. ed. 128, where the court ob-

served: "This court follows the construction of a state statute by the highest of the state, which is a rule of property of that state;" and numerous other decisions of that court shown on page 850 of Roses' U. S. Sup. Court Dig., Cent. Digest, Vol. 13, Section 958; and Vol. 2 of Digest of U. S. Sup. Crt. Rep. page 2337, etc.

THE RULE IN CASE OF DECEDENTS.

The case of *Aspden et al.* v. *Nixon et al.*, 45 U. S. (4 How.) 467, 11 L. ed. 1059, arose over the estate of Mathias Aspden, a subject of the King of Great Britain, and domiciled there, situated both in England and in the State of Pennsylvania. In 1791, Aspden, while in the State of Pennsylvania, made his will and died in England in 1824, whereupon Henry Nixon of Philadelphia, one of the executors of that will, presented the same for probate in the Orphans' Court of Philadelphia County, Pa., in 1824, and did the same in the proper court in England in 1825. It seems that the will disposed of all his estate to his "heirs-at-law," without designating who they were. Numerous claims were presented to this estate, but the same was finally determined in favor of John Aspden, of the County of Lancashire, England, by a decree of court of the Circuit Court of the United States for the Eastern District of Pennsylvania, in 1833; and in 1834 Janet Jones, Thomas Poole and Mary, his wife, moved to file

a supplemental bill and bill of review in the Circuit Court, said Janet and Mary claiming to be the heirs-at-law of John Aspden, the heir of said Mathias Aspden. The motion was overruled as coming too late, etc. It was then taken to the Supreme Court of the United States, as above cited, and as to the law which governed the estate situate in the state of Pennsylvania, that court held (page 1074, L. ed.):

> "It is proper, however, to remark, in this connection, that the courts of the United States held in Pennsylvania are administering the law of that state, and bound by the same rules governing the local tribunals; and that by these laws a devisee, before he can take a legacy, must give security that if any debt or demand should afterward be recovered against the estate of the testator, the devisee shall refund, etc."

Meade v. *Beale*, Fed. Cas. No. 9, 371 (Taney, 339), it was held that it is the right of every state to determine for itself to whom and by whom and by what instrument property within its borders may pass. Questions involving the validity of bequests to unincorporated associations, if brought before the federal courts, must be determined by the law of the state in which the administration lies, as laid down in the decisions of the highest court of that state.

The case of *Middleton* v. *McGrew*, 23 How. 45, 16 L. ed. 403, was a controversy arising over lands situated in the State of Texas, which had formerly

belonged to Joshua Davis, a colonist, who died in 1835, intestate and without issue, leaving brothers who are citizens of the United States, and who made a conveyance to the plaintiff therein for the lands in controversy. The lands seem to have been acquired by the deceased under the Mexican Government, or the Republic of Texas, and the right of said brothers to inherit said lands became involved in the case, and in passing on that feature, the Supreme Court of the United States held: "By the laws of Mexico, heirs, being aliens, could not inherit an estate. This law of descent is applicable to the landed property of Texas." And, as shown by the decisions of Texas cited in that case, that was the holding of the Supreme Court of that state; and in *Bylthe* v. *Easterling*, 20 Tex. 565, that court observed: "That it is too well settled by repeated decisions of this court to be longer regarded as an open question, that at the period of the death of the decedent, his heirs, being aliens, could not inherit his estate." Here is the recognition by the Supreme Court of Texas that such decisions of descent had there become a rule of property, and that rule of property as to the laws of descent in that state, was not only cited, but followed, by the Supreme Court of the United States in that case, and related back to the time of the death of the ancestor, as to whose death such rights must be determined. The case of *Vonley* v. *Lavender et al.*, 21 Wall. 276, 22 L. ed. 536, was brought in the Circuit Court of

Arkansas by Yonley, to recover certain lands. The plaintiff claimed it under an execution sale by a United States Marshal, issued on a judgment rendered by the Circuit Court of the United States in favor of one heir against Halliburton, as administrator of A. B. C. Du Boise; and the defendant claimed it under the administrator of said Du Boise, deceased. The Courts of Arkansas held the plaintiff's deed void, on the ground that the federal court had no power to sell such lands while the same were under administration in the State of Arkansas, and that the Probate Court thereof alone had jurisdiction of such matters. It was thus appealed to the Supreme Court of the United States, and by this court affirmed, holding:

> "*1.* The several states of the Union have full control over estates of deceased persons within their respective limits.
>
> *2.* The United States Courts cannot execute judgment against the estates of deceased persons in the course of administration in the states, contrary to the declared law of the state on the subject.
>
> *3.* The administration laws of a state will be observed by the federal courts in the enforcement of individual rights.
>
> *4.* On a judgment in a federal court against an administrator, the real estate of the intestate cannot be sold contrary to the laws of the state upon that subject."

This case was cited with approval and followed by Justice BREWER in delivering his opinion in *Dodd* v. *Ghiselin*, 27 Fed. 405, where it is held:

> "State laws providing for the settlement of estates of deceased persons are binding upon federal courts."

In *Maxwell et al.* v. *Moore et al.*, 22 How. 185, 16 L. ed. 251, it was held by the Supreme Court of the United States that:

> "Where it has been decided by the Supreme Court of Arkansas that a special act of that state authorized the administrator to make a valid deed, and divest the title of the heirs, such decision on the effect of the state statute is conclusive on this court."

In *Lippincott et al.* v. *Mitchell*, 94 U. S. 770, 24 L. ed. 315, it was held by the same court that "A rule of property of a state binds this court as much as if it were a part of the statute."

In *Gardner* v. *Collins*, 2 Pet. 58, 7 L. ed. 347, which involved the statute of descent of Rhode Island, the Supreme Court of the United States held:

> "Where the question upon the construction of the statute of a state relative to real property has been settled by any judicial decision in the state where the land lies, this court, upon the uniform principle adopted by it, would recognize that decision as a part of the local law."

And in *Christy* v. *Pridgeon, Admr.*, 4 Wall. 196, 18 L. ed. 322, the same court observed:

> "The statute law of the state furnishes the rule of decision of this court, as far as they comport with the Constitution of the United States, in all cases arising within the respective states.
>
> A fixed and received construction of their respective statute laws, in their own courts, make, in fact, a part of the statute law of the country.
>
> Where these decisions have become a rule of property in a state, this court receives them as having a binding force almost equivalent to positive law."

The import of these decisions is that the laws of descent and administration governing the estates of decedents who resided in a state, and wherein such estates are situated, are to be looked to and the decisions of the highest judicial tribunal of that state followed in determining the full significance of such statutes; and where such decisions have ripened into a rule of property, those rules are binding on all courts, both state and federal. It further follows that as to state statutory laws of this character, it is not competent for the decisions of federal courts to become rules of property, for they originate under state authority, which alone has such jurisdiction, and upon whose courts the power and authority of construction and interpretation is bestowed under our form of government. Under this line of decisions of the Supreme Court of the United States, we must look to the decisions of the highest

court of a state for the interpretation of such of its statutory laws, and when they have become rules of property, the citizens of that state are protected by them and all courts are bound by them in the disposition of estates arising under them.

From these decisions, it follows that, had the lands in controversy in this case been situated in the State of Arkansas, instead of in Indian Territory, the title thereto would have passed under Chapter 49 of that state as a new acquisition in fee to said children of plaintiff in error, subject to a life estate in the father and mother, and in case of any controversy over the same, reaching the Supreme Court of the United States, this court, under its repeated decisions above cited, would very probably adhere to the decision of the Supreme Court of Arkansas in the case of *Kelly's Heirs* v. *McGuire et al.*, 15 Ark. 555, and other decisions in accord therewith, hold that to be a rule of property and binding on it as a part of the very statute itself. This would be in accord with its whole course of decisions on that subject. If the Supreme Court of the United States is bound by these rules and principles, as it has so often held, then we may ask, by what authority or power can the Circuit Court of Appeals of the United States deviate from the same and render an entirely different decision, giving this same statute a meaning and construction it never had before, and which today is not followed or rec-

ognized in the state of its origin, and not provided for in the terms or provisions of that statute itself?

That this *Kelly* decision construing the statute of descent of Arkansas had become so settled and established that it had become a rule of property in that state before its adoption by Congress, there can be no doubt or dispute. Then, if by adopting a statute, all incidents thereto, including its construction and interpretation by the mother state, is also adopted as a part thereof, and the same is as binding on the courts as the text itself, as so held by these numerous decisions above cited, did not Congress also adopt this previous construction and rule of property arising out of the chapter at the very time it adopted that statute itself? Surely so, and it became a rule of property, binding on all courts, even the Supreme Court of the United States, as soon as thus adopted, and remained so ever after, and settled down upon every estate of a decedent to which said chapter was applicable. Congress adopted this chapter, the first time, in May, 1890, and the last time on the 28th of April, 1904, and at different times between these two dates. So that it was in full force and effect in the Indian Territory on the 3rd day of May, 1907, at the time said Waitie died, and the title to his lands thus vested in his heirs. Nor was that rule disturbed or said chapter given any construction other than that given it by said decisions of said state of its origin, until nearly two years after the death of said Waitie, and 17

years after the rule had been thus established and said statute construed, when this *Shulthis* decision was rendered giving the statute an entirely different meaning from that given it in all previous decisions of all courts which had ever passed on the same. Not only this, but between the death of said Waitie and the rendition of said decision, the territorial form of government of Indian Territory had passed out of existence, and new laws of descent had taken their place, and the courts of that Territory had also been abolished. Verily, verily old things had passed away, and all things become new.

We have already seen that where Congress adopts a state statute, it and the federal courts are bound by the prior constructions of that statute made by the highest judicial tribunal of the state from which it was adopted, and that said statute, after the adoption, becomes a federal statute, subject to all these incidents appended to it before the adoption. We have also seen that where the construction of a statute ripens into a rule of property, vested rights under such rule cannot be divested by a subsequent change of that rule. Then, we may well inquire: What effect can this *Shulthis* decision have on the rights of the plaintiff in error to the lands in controversy in this suit?

In the first place, if by such adoption of such statutes by Congress, the prior construction and established rules arising therefrom under the decisions of the Supreme Court of Arkansas became a part

thereof, and as binding on the Supreme Court of the United States as the text itself, as so held in the decision heretofore cited, then it follows as inevitable that the same are also absolutely binding on all the subordinate federal courts as well, and all other courts passing on said statutes, and this decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal et al.*, 179 Fed. 529, is wrong and totally at variance with the principles and rules adhered to by the Supreme Court of the United States in the cases we have cited and numerous other cases decided by this court. If such construction and rules were binding on that court, it could no more ignore them than could any other subordinate court ignore the decisions of the court of last resort of the jurisdiction in which it existed; and if it did so, then, like any other decision of a subordinate court, its decision has no binding force as authority, for "whatever is conclusive of title to land in the courts of a state, is equally conclusive in the federal courts," *Blanchard* v. *Brown*, 3 Wall. 245, 18 L. ed. 69; *Fisher* v. *Haldeman*, 20 How. 194, 15 L. ed. 879; *Slaughter* v. *Glenn*, 98 U. S. 247, 25 L. ed. 122; and *Morgan* v. *Curtenius et al.*, 20 How. 1, 15 L. ed. 823, where the court observed:

> "The court follows state decisions which are state rules of property, in regard to title to land. But where the Circuit Court has decided a case of title to land in accordance with the then state decisions, this court will not reverse

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the decision of the Circuit Court, because since that decision the state courts have reversed their decisions."

Here the court will bear in mind that, in the *Shulthis* decision, the Circuit Court of the United States for the Eastern District of Oklahoma, did decide that case in accordance with the whole line and course of decisions arising under said Chapter 49, and held such lands to be a new acquisition, and decreed accordingly. Then, under the rule last presented, if such had been decided by a Circuit Court of Arkansas, following the line of decisions of the Supreme Court of that state, and the case had found its way into the Supreme Court of the United States, and then the Supreme Court of Arkansas had, after the decision below, changed its line of decisions, the Supreme Court of the United States would not reverse the decision before it. Would not the same result arise and the same principle be applied in this *Shulthis* case? There is all the better reason to adhere to such a rule in the *Shulthis* case, for it is possible for a Supreme Court of a state to reverse its former decisions, and the last decision becomes the law for all purposes, except it cannot operate to divest vested rights arising under the former decision arising on contracts or rules of property. But the decisions of the Circuit Court of Appeals are not final, and do not have the same effect as decisions of the Supreme Court of a state

on state matters. From such decisions of the Circuit Court of Appeals of the United States, appeals may be taken to the Supreme Court of the United States, whose decision only, becomes final and binding on all concerned, and under the line of decisions above cited in this brief, this court would follow the construction and interpretation given Chapter 49 by the Supreme Court of Arkansas prior to its adoption by Congress, which, in our opinion, would be in perfect accord with the decision of the Circuit Court of the United States first rendered in the *Shulthis* case by Justice CAMPBELL.

Not only this, but in the case of *Blaylock* v. *Incorporated Town of Muskogee* (July 28, 1902), 117 Fed. 125, this same Circuit Court of Appeals held:

> "1. The extent of the powers and liabilities of municipal corporations under the statutes of a state is generally a question of local law, upon which the decisions of the courts of the state are authority in the national courts.
>
> 2. The enactment or adoption of a statute, which has been elsewhere in force, is presumed to be the adoption of the construction which had been previously given to that statute by the judicial tribunals whose duty it was to interpret it.
>
> 3. On May 2, 1890, Congress made Chapter 29 of Mansfield's Digest of the Laws of Arkansas, which govern municipal corporations, a part of the law of Indian Territory (Chapter 15, Ind. T. Ann. St. 1899). Prior to that time the Supreme Court of Arkansas had twice held

that municipalities subject to that chapter were exempt from liability to individuals for negligence in the construction, maintenance, or repair of their streets. *Held*, the legal presumption is that when Congress adopted the statute of Arkansas as the law of Indian Territory, it also adopted the construction of this statute which the Supreme Court of that state had previously put upon it, and a municipality in Indian Territory governed by this Chapter 29 (Chapter 15) is not liable to individuals for defects in its sidewalks or streets, notwithstanding the fact that the more reasonable rule, which is sustained by the greater weight of authority, is otherwise."

Judge SANBORN, in delivering the opinion in this case, observed:

"When this chapter was made a part of the laws of Indian Territory by the Act of Congress of May 2, 1890, it was, therefore, the established rule in the State of Arkansas, settled by the uniform decisions of its highest tribunal, that corporations empowered to make and maintain streets and sidewalks under this statute were not liable to individuals for injuries caused by defects in them, or by the negligence of the corporation in the exercise of this power. The decisions of the Supreme Court of Arkansas, which established this rule, were not determinations of questions of general or commercial law, but they were the interpretation of the local law—of local statutes of the State of Arkansas—which measured the powers and liabilities of municipalities in that state. The federal courts uniformly follow the construction of the con-

stitution and statutes of a state announced by its highest judicial tribunal in all cases that involved no question of general or commercial law, and no question of right under the constitution and Acts of Congress. The character and limits of the powers and liabilities of the political or municipal corporations of a state are questions of local law, upon which the decisions of the Supreme Court of that state are authoritative in National Courts, because these questions are determinable by a construction of the constitution and statutes of the states under which the municipalities are organized. *Madden* v. *Lancaster Co.*, 65 Fed. 188, 192, 12 C. C. A. 566, 570; *City of Detroit* v. *Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. ed. 260; *Clairborne Co.* v. *Brooks*, 111 U. S. 410, 4 Sup. Ct. 489, 28 L. ed. 470.

The result is that prior to May 2, 1890, Chapter 29 of Mansfield's Digest of the Laws of Arkansas (Chapter 15 Ind. T. Ann. 1899), has been so authoritatively construed by the highest judicial tribunal of the state from which it was taken that municipal corporations governed by it were not liable, either in the state or federal courts, for injuries to individuals produced by the negligence of the corporations in the construction, maintenance or repair of their streets and sidewalks. Thereupon Congress made this chapter a part of the laws of the Indian Territory. The adoption of a statute or a law previously in force in some other jurisdiction is presumed to be the adoption of the interpretation thereof which had been theretofore placed upon it by the judicial tribunal whose duty it was to construe it. *Sanger* v.

Flow, 48 Fed. 152, 154, 1 C. C. A. 56, 58; Black, Interp. Laws, p. 159, Sec. 70.

Hence the legal presumption is that the powers and liabilities of municipalities in the Indian Territory under Chapter 29 of Mansfield's Digest (Chapter 15, Ind. T. St. Ann. 1899), are the same that the powers and liabilities of such corporations in the State of Arkansas were at the time Congress made that chapter the law of the territory. Inasmuch as such corporations were not liable to individuals for the injuries which they sustained from negligence of the municipalities of Arkansas in the case of their streets and sidewalks under this chapter, the defendant, whose powers and liabilities are measured by the same statute, and by the same construction of it which had been adopted before it had become the law of Indian Territory, is not subject to such liability, and the judgment below must be affirmed."

We found this last decision after writing the preceding part of this brief, and have quoted from it at considerable length for the reason that it expresses in a small space the very rules and principles we have tried to establish by the long line of decisions heretofore cited, namely, that by adopting these Statutes of Arkansas, Congress also adopted their construction and interpretation along with them, which had been made by the Supreme Court of Arkansas prior to their adoption; that such interpretation thereby became a part of the statutes themselves and was as binding on all courts passing on the same, as the *very text* of the statute itself;

and that the statutes and their interpretation came into force and effect at the same time, and remained ever thereafter and so binding on every court before which such statutes came for enforcement, and are still to be so considered in passing upon all matters arising under such statutes.

Here is an open recognition by this same Circuit Court of Appeals of these facts fully presented in that case where they are also enforced, although it is apparent from the decision itself that that court was of the opinion that such rulings of the Supreme Court of Arkansas in construing Chapter 29 of said Digest, were not in accord with the weight of authority on that subject. But still, the court refused to depart from these adopted constructions of that statute but followed them. It will also be observed that in that case there were only two of such previous interpretations by the Supreme Court of Arkansas, and the same were strictly followed and the decision of the lower court affirmed. As to Chapter 49 of that state, put in force at the same time as Chapter 29 involved in that case, there is a *long line* of invariable decisions of the same Supreme Court, construing and interpreting its meaning and application, and then applying such rules to the chapter itself—a line extending back to 1854, when that chapter was thus first construed in the case of *Kelley's Heirs* v. *McGuire et al.* It is too plain for argument that, under these decisions, these same rules

and principles must also be applied to Chapter 49 as were recognized as to Chapter 29 thereof; and in passing upon estates arising under this law of descent and distribution, such interpretation and construction given said Chapter 49 by the Supreme Court of Arkansas must be applied, and are conclusive of the meaning of such chapter on all courts, both state and federal.

In *Hayes* v. *Barringer*, 168 Fed. 225, was a contest over the will of a Choctaw or Chickasaw Indian, made before receiving her lands of those nations, and the same was held void by the Circuit Court of Appeals; and in discussing that case it was held that the lands in controversy passed by descent under Chapter 49 of Arkansas, also put in force in those nations by treaties. In speaking of this chapter, Judge SANBORN observed:

> "There were laws of the State of Arkansas in Mansfield's Digest which provided for the disposition of property by will (this part omitted), and by descent and distribution (Chapter 49). The United States and the Chickasaw and Choctaw Nations selected the latter chapter from these various laws, and agreed and enacted that the lands allotted to an enrolled member of the Chickasaw or Choctaw tribes after his death should descend to his heirs as provided in that chapter, *and there is no rational or logical escape from the conclusion that the lands in controversy in this case so descended.*" (Italics are ours.)

Thus, from the conclusion that all courts are now bound by the provisions of these adopted statutes and their prior construction by the Supreme Court of Arkansas, there is no escape. It will not do to say a court can ignore them with impunity; for that would throw wide open the gate to all kind of speculation, leave the courts to wander at will wherever they saw proper, and, like a ship without a rudder on turbulent sea, be tossed here and there, according to the caprice of the personnel of the court, or pressure brought to bear upon the court by those having extraneous notions of their own. Where statutes are expressed in plain and unambiguous language, there is no room or cause for construction, but the courts are bound by the language of that statute; but when ambiguous, it is the duty of the court to construe and apply them; and when so construed and that construction is of long standing until it becomes a rule of property and rights thereunder arise which cannot be divested by some subsequent construction different from the former, such former construction should not be changed except for the most urgent reason. Black on Interp. of Laws, p. 375. In the *Blaylock* case above cited, the Circuit Court of Appeals of the United States *did adhere* to the former constructions given to Chapter 29 of Mansfield's Digest, adopted by Congress at the time it adopted Chapter 49, and followed such construction, although convinced that said construction was contrary to the weight of au-

thority on that subject. Then, why not apply the same rule to Chapter 49, which has time and again received construction by the Supreme Court of Arkansas, and follow the construction given that chapter also by that court? It is too plain that the same rule applied to Chapter 29 thereof by said Circuit Court *must* be applied not only to Chapter 49 of said digest, but likewise to all other statutes thus adopted by Congress from the State of Arkansas. There is no getting away from this conclusion unless it would be simply to ignore this whole line of decisions herein cited, even including this *Blaylock* case and *Robinson & Co.* v. *Belt, supra*, which are directly in point, and, in our judgment, conclusive on the courts passing on these statutes so adopted.

This would narrow down the consideration of all matters in the case at bar to the legal proposition as to whether the lands in controversy are ancestral, or a new acquisition, provided for in said Chapter 49 of the Statutes of Arkansas. But even on that proposition, the court, under the rules and decisions above cited, are confined to the language of such statute and the constructions given it by these prior decisions of the Supreme Court of the State of Arkansas, from which it was thus adopted. We have cited many of those decisions whereby this chapter has been by said Supreme Court construed and fully explained and the distinction between ancestral estates and new acquisitions have been fully expounded, and by which decisions such constructions and interpretations have become firm-

ly established and become rules of property, long before such statutes were adopted by the Congress of the United States; and, by this line of decisions above cited, we have shown that such constructions and interpretations are as binding on the courts as the text of the statute itself, and by which all courts must be bound, even the Supreme Court of the United States, and by which the Circuit Court of Appeals has, in the *Blaylock* and other cases thereof herein cited, acknowledged itself bound to follow and decree accordingly. To the same effect is the decision of *this state court*, rendered in the case of *National Live Stock Commission Co. et al. v. Tallifferro et al.*, 20 Okla. 177.

We have also seen that, according to this line of decisions of the Supreme Court of Arkansas, construing and interpreting Chapter 49, an ancestral estate arising thereunder must arise by *descent*, *devise* or *gift* from some ancestor of the intestate and of the blood of such intestate, and in no other way can it possibly arise or come into existence; and on the death of such intestate, without issue, the lands thus obtained must go back to such ancestor, if living, and if not, then to his nearest of kin, etc.; and that all *other* estates which can possibly arise under said chapter, are new acquisitions, and upon the death of the owner thereof, intestate and without issue, go first to the father for life, and then to collateral kindred; and in default of father,

then, to the mother for life, and then to collateral kindred as before provided.

On this branch of the case, we call the attention of the court specially to the decisions of the Supreme Court of Arkansas in *Hogan* v. *Finley,* and *Magness* v. *Arnold.* In the former case, the lands in controversy had been public lands of the State of Arkansas, and taken up and patented by Thomas V. Taylor, a minor, by his father paying the entry fees. This minor thereafter died, intestate and without issue; and soon after the father died, leaving a will by which he devised said lands to his daughter, Mrs. Finley, who brought an action of ejectment to recover said lands under said will. That case went to the Supreme Court of that state, which held such lands to be a new acquisition in the hands of said minor, although the father had paid the fees incident to such entry, and gave it to the brothers and sisters of said infant.

The *Magness* case is even stronger and more demonstrative of this distinction than the other. The lands in that case were formerly public lands of the United States and situated in the State of Arkansas, and were patented to Mary Ann Magness, also a minor of about three and one-half years of age. But by whom the fees in this case were paid, does not appear in the case. After the lands were thus patented to this child, it dies intestate and without issue, leaving a mother and half-brothers,

who were children of its father by a former wife. The Supreme Court of Arkansas held in that case that the lands in controversy were a new acquisition; and on the death of said Mary Ann, without issue, descended to the mother, Rebecca, for life, with the fee simple title thereto to said half-brothers.

These two decisions are as nearly analagous to the lands in controversy as we have been able to find decided by the Supreme Court of Arkansas, under this chapter now under consideration. But we presume they and the other decisions and authority we have cited in this brief, are amply sufficient to establish, *first*, the distinction between an ancestral estate, and a new acquisition; *second*, that said Chapter 49 of the Statutes of Arkansas embraces, and provides the laws of descent for, *every landed estate capable of being held or acquired in the State of Arkansas; third*, that under said chapter, an ancestral estate is one derived only by descent, devise or gift from some ancestor of the intestate, on whose death, without issue, it descends to said ancestor or his nearest blood relation; *fourth*, that every other estate acquired in any other form or manner than by descent, devise or gift, from such ancestor, is a new acquisition; and on the death of such intestate, without issue, descends to his father and mother, in succession, for life, with the fee in his nearest kindred, as provided in Section 2531 of said chapter.

Then, in which class will the lands in controversy in this suit fall, that of ancestral, or a new acquisition, according to these decisions and authority heretofore cited? We suppose it will not be contended by the learned counsel for the defendants in error that said Waitie obtained them by descent, devise or gift from some ancestor; for it is charged in the petition in this case that said lands were derived from the Creek Nation, etc., and patented to him as provided in such case, and this is admitted by their motion filed to said answer and they are now bound by their admissions so far as the facts are concerned; and, *second*, it is a known fact that all such lands arose by virtue of the Creek treaties with the Government of the United States, and that all rights acquired at all by said Waitie were derived exclusively by reason of and through said treaties. If not derived by descent, devise or gift from some ancestor, then, it could not possibly be an ancestral estate as created and provided for in said chapter, but must come in under its other division thereby created, namely, a new acquisition, and be governed by Section 2531 of said chapter and the decisions of said state construing said chapter.

As heretofore stated, it was held in *Hogan* v. *Finley* and *Magness* v. *Arnold* that the lands therein involved, one being public lands of the State of Arkansas and the other public lands of the United

States, were new acquisitions in the hands of said minors, and on their deaths, respectively, passed as new acquisitions, as provided in said chapter.

In *Adams* v. *Wallace*, 143 Fed. 716, and in *Ligon* v. *Johnson*, 164 Fed. 670, the Circuit Court of Appeals held that the lands of Indian Territory were public lands; and in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 Law ed. 1041; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 47 Law ed. 183; and *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 Law ed. 299, the Supreme Court of the United States also held such lands to be public lands, and under the plenary powers of the Congress of the United States; and these decisions were cited as authority on this feature by Judge Sanborn in the case of *Hayes* v. *Barringer*, 168 Fed., pp. 222-223.

It follows, therefore, that prior to the allotment of the lands of the Five Civilized Tribes among their several members of these respective tribes, these lands were public lands of the United States, and practically in the same condition, and under the same control and disposition, as other public lands of the United States, and were under the absolute power and control of Congress. See, also, the late case of *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 55 Law ed. 738.

Then, the lands in controversy, on being patented to said Waitie Washington, came to his hands as the public lands of the United States, the same

as did the public lands of the United States come to the hands of Mary Ann Magness, which were held by the Supreme Court of the State of Arkansas to be a new acquisition, and, on her death, descended as a new acquisition to her mother for life, with remainder in fee to her half-brothers. The same was also true under the decision of that court in the case of *Hogan* v. *Finley*, where those lands were public lands of the State of Arkansas. These conditions of the lands involved in each instance are as nearly analagous as could well be desired; and in each of the two decided cases, the lands were held by that court to be new acquisitions. If the lands in the *Magness* case, being public lands of the United States before entry, were a new acquisition, why would not the lands of said Waitie be also, they being public lands of the same sovereign power as the other lands, and held in the same condition and under the same control? The answer is apparent and conclusive that such lands *are* new acquisitions and are governed by Section 2531 of Chapter 49 of the Statutes of Arkansas, and on his death they passed thereunder to the father and mother, in succession, for life, with the remainder in fee to the half-brothers and sisters; and that the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal et al.*, 170 Fed. 529, is wrong *in toto* as to the law of descent.

Inasmuch as the decision of the trial court below was, in the case at bar, predicated upon this case of *Shulthis* v. *McDougal et al.*, this case should,

for the reasons heretofore assigned, be reversed, and a decree herein entered decreeing the lands in controversy to the father, for life, with the remainder over in fee to the half-brothers and sisters.

Nor is this the only reason why the decision in this case and that of *Shulthis* v. *McDougal* is erroneous. Waitie died on the 3rd day of November, 1907, intestate and without issue. It is a matter of common information that everybody knows that immediately upon the death of the owner of lands, the title to such lands of which such person dies seized, passes to that person's heirs under the laws of descent of the state or country where such lands are situated, in force at the time of such death, and not such as may be thereafter created. So that in the case at bar, the title to these lands of said Waitie passed to his heirs at law, on the 3rd day of November, 1907; and there it remains, even yet.

In *Nevins* v. *Nevins*, 4 Ind. Ter. Rep. 579, the Court of Appeals of Indian Territory observed:

> "As the only question in this case now is as to whether the distribution of the estate of Jeff Nevins should have been under the Cherokee or Arkansas law, we will confine ourselves to this issue. Jeff Nevins died before the passage of the Curtis Bill, leaving surviving him his wife, Bettie Nevins, the appellee. He left no children or their descendants. The Cherokee statute of descent provides that: 'Whenever any person shall die possessed of property not devised, the same shall descend in the follow-

ing order, to-wit: *First*, in equal parts to the husband or wife, and the children of such intestate and their descendants. The descendants of a deceased child or grandchild to take the share of the deceased parent equally among them.' Comp. Laws Cherokee Nation, 1892, Section 518, p. 267. Under this statute the widow of Jeff Nevins was entitled to all of the estate of her deceased husband, including his share of the estate of his father, Moses Nevins; and, inasmuch as he had died before the enactment of the Curtis Bill, the rights of the appellee, Bettie Nevins, as the widow and heir, had vested under the Cherokee act, and no subsequent Act of Congress annulling the laws of the Cherokee Nation could divest those vested rights. Such an act would be retroactive, and in violation of the fifth amendment to the Constitution of the United States. Wade on Retroactive Laws, 156; *Steamship* v. *Jolliff*, 2 Wall. 450, 17 Law ed. 805; *Memphis* v. *U. S.*, 97 U. S. 293, 24 Law ed. 920; Lawson's Rights and Remedies, Vol. 7, Sec. 3850; Black. Const. Prohib., 176, 183, 207; Southerland on Stat. Const., 490; *Wilkinson* v. *Leland*, 2 Pet. 627, 7 Law ed. 542; *Sims* v. *Irvine*, 8 Dall. 425, 1 Law ed. 665. As the master's report, which was confirmed, and the decree of the court below, were based upon this view of the law, we find no error in the proceedings, and it is therefore affirmed; and the original judgment of this court, reversing the same, is set aside."

By reason of the 5th and 14th Amendments to the Constitution of the United States, neither Congress nor a state legislature can pass any law by

which the title to lands previously vested can be divested; and this applies as well to lands which have passed under the laws of descent to the heir before the passage of the act. Black on Interp. of Laws, pp. 256 to 260, inclusive; Black on Constitutional Law, pp. 493 to 496; 8 Cyc, 912, 913; Cooley's Const. Lim., p. 511; and 36 Cyc, 1210, 1211. See specially, *Rock Hill College* v. *Jones*, 47 Md. 1; and note to *Barnitz* v. *Beverly*, 163 U. S. 118, 41 Law ed. p. 95; 10th Cent. Digest, p. 1519.

Nor would the repeal of the laws of descent of a state divest the title of the heirs to lands which had previously descended to such heirs. 44 Cent. Digest, 2966, etc.; 26 Am. & Eng. Ency. of Law, 746; and *Fletcher* v. *Peck*, 3 Law ed. 86, and *note*.

Then, if the legislative department of a state or Congress can not divest a vested right in property by its enactment, we may well suggest that the judicial department can not do so, either.

In Cooley, Principles of Const. Law, the author observes:

> "It is declared by the fourteenth article of the amendments, that 'no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' This provision is directed at state action only, not at the action of individuals; but since the state must act through some of its departments or officers, under the term 'state action' will be included the action of any depart-

ment or instrumentality representing the state. But where a state court, acting within its jurisdiction, renders an erroneous decision whereby a party is seemingly deprived of his property without due process of law, the remedy is an appeal from such decision to the appellate court, which can correct the same. *Arrowsmith v. Harmoning, Admr.*, 118 U. S. 194, 30 Law ed. 243; *Shreve v. Cheesman et al.*, 69 Fed. 786 and 792, where Judge SANBORN, in delivering the opinion in that case, observed: 'Neither courts nor legislatures should give a retrospective effect to radical changes in rules of property or of practice'."

In *Minnesota Mining Co. v. The National Mining Co.*, 70 U. S. 3 Wall. 332, 18 Law ed. 42, the Supreme Court of the United States observed:

> "Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided they should no longer be considered doubtful. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only, but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change."

The case of *Germania Iron Co. v. James et al.*, 89 Fed. 811, is of kindred nature and deserves some consideration. There an entry had been made upon public lands under rules and regulations of the land department existing at the time of entry. Afterwards this department attempted to change the rules and gave preference to another entryman, and the case went up for review to the Circuit Court of Appeals. Judge SANBORN again delivered this opinion, and held in that case that:

> "Neither the Secretary of the Interior nor the Commissioner of the General Land Office has power to make a retroactive decision abrogating rules of the land department; and such a decision, giving preference to an application made in violation of the rules in force when it was made, over an entry made in accordance with such rules, is an error in law reviewable in this court."

It was there stated that the Land Department possessed powers judicial in their nature and had the authority to make such rules and were bound by them, and those entering under them were protected by them also. The decision observes: "Retroactive decisions of judicial tribunals are as vicious and ineffectual as retroactive laws. *Shreve v. Cheesman*, 16 C. C. A. 413, 69 Fed. 785, 792, and 32 U. S. App. 676, 689."

In *Havemeyer v. Iowa Co.*, 70 U. S. 3 Wall. 294, 18 Law ed. 38, the Supreme Court of the United States held:

"If a contract, when made, was valid by the constitution and laws of a state, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action of the state legislature or judiciary can impair its obligation."

In *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 Law ed. 520, the same court observed:

"The objections, that the legislature of Iowa had no authority, under the constitution, to authorize municipal corporations to purchase stock in railroad companies, or issue bonds in payment of such stock, have been fully considered and repeatedly overruled by the Supreme Court of Iowa.

Where these decisions have been overruled by the Supreme Court of the state in a later case, this court is not bound to follow the latest adjudication.

Where the bonds were issued and put upon the market between the periods of these adjudications, this court will be governed by the decisions in force at the time of the sale of the bonds.

If the contract, when made, was valid by the laws of the state as then expounded and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent legislation or decision of its courts. The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law."

In *Douglass* v. *Pike County*, 101 U. S. 11 Otto 677, 25 Law ed. 968, this same court held:

"This court treats the construction which the highest court a state has given to a statute of the state as a part of the statute.

But where different constructions have been given the same statute at different times, it will not follow the latest decision, if thereby contract rights which have accrued under earlier rulings would be injuriously affected. The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

In *Louisiana v. Pilsbury*, 15 Otto 26 Law ed. 1090, this court held:

"The construction given by the highest tribunal of the state, to its statute or constitution, must be taken as correct, so far as contracts made under the Act are concerned, and constitutes a part of the law as much as if embodied in it. A subsequent change in such construction can affect only subsequent contracts,"

citing as authority the above cases, and others, as shown on page 1096 of said case.

But in the last cases cited, the courts were dealing with constitutions, statutes and decisions of states and state judicial decisions, and even in these cases, these rigid rules have been enforced and closely adhered to, under these constitutional guarantees of the Constitution of the United States. In passing upon the several statutes thus adopted by Congress from the State of Arkansas and put in

force in the Indian Territory, and in determining their force and legal significance, the court should never lose sight of the fact that by such adoption the Congress made said statutes *Federal Statutes* as much as if enacted *in haec verba.*

Then it must follow that the same rules and principles applicable to other Federal Statutes, are also applicable to such adopted statutes; and any rights or controversy arising under them are cognizable in the Federal Courts, and only the decision of the Supreme Court of the United States upon such matters arising thereunder, would be final and conclusive on all other courts. And since it has been repeatedly held by the Supreme Court of the United States that, in cases where state statutes have been adopted by Congress or a state, that court was bound by the prior construction given the adopted statute; and the Supreme Court of the United States being the court of last resort as to matters arising under the constitution, laws and treaties of the United States, it must follow that when such matters arising under said adopted statutes reach the Supreme Court of the United States, this court, like the Circuit Court of Appeals, in *Blaylock* v. *Muskogee*, must adhere to these prior constructions of such statutes by the Supreme Court of Arkansas, and hold all lands in the Indian Territory to be new acquisitions, after they were allotted among the members of said tribes in severalty. It also follows

that the decision of *Shulthis* v. *McDougal et al.*, 170 Fed. 529, is not a decision of a court of last resort, and is not binding on the state or any other court, whose duty it may be to pass upon matters arising under said statutes.

But it *was* the imperative duty of the trial court, in passing upon the merits of the case at bar, to adhere to the decisions of the state Supreme Court as far as it had gone along this line of construction. As before said, this state court, in *The National Live Stock Commission Co.* v. *Talliferro*, 20 Ok. 177, held, that *it* was *bound* by these former decisions of the Supreme Court of Arkansas, and cited ample authority to establish the correctness of its decision. But the *trial* court failed to follow this decision, and strayed off, and by so doing, attempted to divest the rights and interests of the plaintiffs in error in and to the lands in controversy, and thereby vest the whole title thereto in the defendant in error.

As everybody knows, the title to lands vests in the heirs the moment life becomes extinct in the ancestor, which took place in the case at bar, on the 3rd day of November, 1907. This *Shulthis* decision did not take place for nearly two years after the death of said Waitie, and after a life estate in said lands had vested in the plaintiff in error according to this line of decisions of the Supreme Court of Arkansas. And, if it be correct that a subsequent decision even of the highest court of a state or the gov-

ernment, can not divest rights, as shown by the decisions of the Supreme Court of the United States, above cited, then, the decision of the trial court in this case is plainly wrong, and should be reversed, even if that *Shulthis* case was admitted to be correctly decided. The trial court in this case was not governed by this decision of the Circuit Court of Appeals, but *was* governed by the decision herein cited.

This case was decided simply upon said motion for judgment on the pleadings, while the case in *Hayes* v. *Barringer*, and *Blaylock* v. *Muskogee* were decided on demurrers; and by sustaining such motion the trial court held necessarily that the plaintiff in error had no right or interest in said lands of which his son Waitie died seized. This, in effect, gives to this *Shulthis* decision a retroactive effect to the estate of said Waitie, which had already vested long prior to the decision, and under the former decisions priorly given that statute by the Supreme Court of Arkansas, and long before said state court had recognized the same rules and principles by its decision in this *Talliferro* case, which was rendered on the 4th of February, 1908. It, therefore, follows that the decision of the trial court in the case at bar and said State Supreme Court were erroneous, for this reason also, namely, that its effect was to divest the vested rights of the plaintiff in error, and vest them in others, which is contrary to the law governing his case, and is not

due process of law; and the case should be reversed for this reason, as well as on the ground that the decision is erroneous because the same is wholly at variance and contrary to the laws applicable thereto from every aspect of the case.

The next question is, Is the *Shulthis* case itself correct, and decided on correct principles? We answer in the negative; *first*, because it is contrary to the rules, principles and decisions hereinbefore cited; *second*, because it is not sustained by the letter, language or terms and provisions of Chapter 49 of the Statutes of Arkansas on which it is founded, or supposed to be predicated; *third*, the theory on which the same is decided is not in accordance with the law which governs that or other cases arising under said chapter.

It would serve no useful purpose, under this first head, to again go over this line of decisions, rules and principles established by them, further than simply to say that this is an Act of Congress and bound by the rules of construction laid down by the Supreme Court of the United States, in such cases, and the decisions of the Supreme Court of Arkansas, which will not sustain the conclusion reached in that case, for the rule so established by that court before such adoption became a rule of property on their adoption in Indian Territory, and cannot be so changed by judicial construction or

legislative action as to change vested rights, as heretofore shown.

As to the second head, we have shown by citation of authority that where the language of a statute is plain and unambiguous there is no need of construction, but it becomes the duty of courts to accept this plain meaning of the language of the legislative body which passed it. The language itself, when unambiguous, is conclusively held to express the intention of the legislature, and the discovery of that intention is the cardinal point in construing all statutes. But from the historic development of this chapter disclosed by the decision of the Supreme Court of the State of Arkansas from whence it came, and from whence it was adopted by Congress, it is shown not to have been, in its original application, certain and unambiguous; but by such decisions, its meaning and application was made clear, certain and unambiguous, and its terms, provisions and conditions made and provided for on the face of the statute, were thus made to embrace every and all estates, both real and personal, which could possibly arise in the state of its origin; and thereby forever classed such real estate as either ancestral or a new acquisition. No third or other kind of an estate can possibly arise under that statute, without openly violating this language of the statute and the constructions given it by the Supreme Court of Arkansas, before its adoption

by the Congress of the United States. If the Congress and the Supreme Court of the United States are irrevocably bound by said decisions of construction by said Supreme Court, as has been abundantly shown to be the case by the numerous decisions of the Supreme Court of the United States hereinbefore cited, and that such construction made prior to such adoption of such statutes becomes a part of the very stattues themselves, as are also so shown by said decisions, and are as binding upon Congress and the Supreme Court of the United States, as the text of the statutes themselves, as also so shown, then whence comes the power and authority of any other court, either state or Federal, to deviate from these constructions and interpretations given the statute by the Supreme Court of Arkansas prior to such adoption? Such power and authority do not come; for, such rules of construction and their legal effect has been fixed by these repeated decisions of the Supreme Court of the United States, and can be changed only by legislation or the Supreme Court of the United States; and, until so changed, are binding upon every court in the United States as the supreme law of the land.

There is a material difference in the case at bar and that of *Shulthis* v. *McDougal*. In that case, Andrew J. Berryhill was born on the 6th day of May, 1901, and died in November of the same year. The lands in controversy in that case arose under the Supplemental Creek treaty, which took effect on

the 8th of August, 1902. Hence, it was that, during his lifetime, Andrew J. Berryhill never owned the lands there in controversy; nor was he, at any time during his lifetime, entitled to the lands or any other lands of the Creek Nation. But, under the express provisions of said treaty, a provision was therein made for setting aside an allotment to his heirs, etc. This was accordingly so done in that case. But it is too plain for argument, that such lands became an estate by *purchase*, and not one of *descent*, at all. Whereas, the lands in controversy in the case at bar were owned and seized by said son at the time of his death, and, therefore, passed by the laws of descent as they existed at the time of his death. Those laws of descent were Chapter 49 of the Statutes of Arkansas, as shown in Mansfield's Digest of 1884. Again, there is a provision in Section 6 of said Supplemental Treaty, in effect, that only Creek heirs can inherit lands of said nation, as long as there are such heirs. At the time of his death, Andrew J. Berryhill left no brothers or sisters, but whether he left any uncles or aunts, does not appear in the case. In the case at bar, said son left both brothers and sisters, who are not parties to this suit.

We have said that that decision will not come within the provisions of Chapter 49. If not, then it falls without, and as a rule of action, it can have no force as a judicial determination of matters arising *under* that statute. On page 533 of the 170 Fed.,

the learned Judge, pronouncing that decision, observes:

> "We must, therefore, look to Chapter 49 of the Arkansas Statute, both to ascertain who the heirs are, and what estate they shall take in the property."

And, again, on the same page, further observes:

> "This statute makes provision for *all possible acquisitions of real property* for the civilized white community whose estates it was intended to govern."

Why confine that chapter to "white community"? Surely, that chapter, especially when adopted by Congress, applied to the whole population of the State of Arkansas, whether white, black, or otherwise. Otherwise, we would have a state of the Union whose laws did not conform to the requirements of the Fourteenth Amendment to the Constitution of the United States, whereby "equal protection" is guaranteed to every "person within its jurisdiction." This chapter was the law of descent of the State of Arkansas, and was equally applicable to the whole population of that state, and as equally applicable to the whole population of each tribe and the citizens thereof, or within the tribal bounds, when spread over the Indian Territory by the Congress of the United States. True, there sometimes came limitations upon the operation of said chapter in said territory, such as shown in Section 6 of said Supplemental treaty, and the provi-

sion of said Act of adoption, such as "far as applicable," etc. But when finally put in force in that Territory, on the 28th of April, 1904, there were no limitations or restrictions to its application to every estate which passed, or intended thereby to pass, under its provision, as the law of descent of said Territory. And, there being no restrictions or limitations prescribed by Congress when so placed in force in said Territory, on said date, upon its operation, force and effect, that chapter, therefore, had the same force, effect and operation in said Territory as to such estates, as it had in the State of Arkansas, and it applied to the same character of estates, regardless of whether the owners were white, black or red citizens of said Territory. That said chapter "makes provision for all possible acquisition of real property," we think is eminently correct; but we insist that it was never confined to the "white community," even in Arkansas, but extended its beneficent provisions to all her citizens alike who might die intestate, seized and possessed of such property. And, we further insist, that, when last spread over Indian Territory as the law of descent of that Territory, on April 28, 1904, it applied equally to each and every citizen of such Territory, whether members of such tribes or not.

Again, it is stated on the same page, that: "Among the people of Arkansas, there was no way of acquiring land except by grant, gift, or inherit-

ance." But we find that, by Chapter 155, those people could make valid dispositions of the property by will and such testimentary dispositions would thus pass lands by devise; and by Chapter 94 thereof, lands in said state could be obtained by seven years' adverse possession alone, and all action in law or equity for the recovery of the same so held was therein forbidden. Such estates are species of estates by *purchase*, of course, but they do not come within a grant, gift, or inheritance. A grant is defined to be "the regular method by common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie in *livery*, and the others as *advowsons*, commons, rents, reversions, etc., to lie *in grant*," and a gift is defined as "the conveyance by gift, *donatio*, is properly applied to the creation of estates—tail; as feoffment, is that of an estate in fee, and lease to that of an estate for life, or years." Blackstone, Bk. 2, section 317.

But, perhaps, the learned Judge by the term *grant*, meant any conveyance by deed for a valuable consideration, and by *gift*, a conveyance by deed *without* a valuable consideration; and by "inheritance," simply the landed estate which was thus holden. But anyway, these were not the only manner in which real estate could be acquired or holden in the State of Arkansas.

On the same page, the opinion goes on to state:

> "This was true even of lands acquired from the Federal Government under the public land laws. The patentee of such lands was always required to purchase the same either by residence and improvement, or the payment of a purchase price, or by these elements combined."

That is true, of course, but still, this makes an estate by *purchase*, and not by *descent*. And in the case of *Magness* v. *Arnold*, where public lands of the "Federal Government" were thus taken up and patented to Mary Ann Magness, the Supreme Court of Arkansas, in construing the character of that estate under Chapter 49 of that state, held such lands in the hands of said Mary Ann Magness to be a *new acquisition*, and not ancestral; which is the very reverse of the conclusion of that learned court, reached in this *Shulthis* case. If all courts, even the Supreme Court of the United States, are precluded by these prior decisions of the Supreme Court of Arkansas, wherein it construed such statute and this character of an estate so derived from "the Federal Government," then it follows as conclusive that this decision is erroneous. The Supreme Court of Arkansas reached that condition of such estate, and so derived before the Circuit Court of Appeals, and if, according to these numerous decisions, that decision is binding on all other courts, that in reality is the end of this legal controversy, the decision of

the trial court in the case at bar should be reversed and this *Shulthis* decision held for naught.

Again, the opinion observes:

> "It needs but a moment's thought to see that, when this statute was applied to the lands of the Creek Nation, it was applied to a subject-matter entirely different from that which was in the mind of the Legislature of Arkansas. The lands of that tribe fit into neither of the classes mentioned in the statute."

Suppose we concede that the conditions existing in the Creek Nation were not "in the mind of the Legislature of Arkansas." Would that prove that such conditions were not "in the mind" of *Congress*, when it repeatedly spread Chapter 49 over the Indian Territory time and again, from 1890 to 1904? It will be observed that Congress persistently put that chapter in force in different ways and as to different tribes in the Indian Territory. And, as observed by Judge SANBORN, in *Hayes* v. *Barringer*, this was the particular law of descent which Congress and the tribes selected, as their law of descent, from among all other laws of descent, even including their own tribal laws on that subject. In the face of these repeated enactments of Congress, it will not do to suppose on a "moment's thought" that the Congress of the United States did not have "in mind" what it was doing when it put Chapter 49 in force in said nation and Indian Territory. Every legislative body is con-

clusively presumed to *know* the object, purpose and general effect of its enactments, and the conditions of the objects to which that law is to be applied, and as to which it is afterward to be enforced. The learned court seems to have lost sight of the fact that it was Congress, and not the State of Arkansas, which was thus legislating for these Indian tribes and all other citizens in the Indian Territory. This fact must ever be kept in view, for the rules of application, or rather the final result which can possibly arise out of a state statute, may be very different from that of a federal statute.

Again, the opinion observes: "The lands of that tribe fit into neither of the classes mentioned in the statute." Only a few lines above this observation, the opinion made the observation that, "This statute makes provision for *all possible acquisitions of real property*," etc. This is the view we contended for, namely, that the statute made "provision for all possible acquisitions of real property," which, in any manner, could possibly arise in the State of Arkansas, and for whose descent Chapter 49 provides. But suppose we concede that the lands of said tribe did not "fit into neither of the classes mentioned in the statute" (a fact, indeed, we do not admit at all), must the *law* give away to the *condition*, or the *condition* bend to the provisions of the *law?* If the law must give away to the condition to which it was intended to

apply and govern, then, as observed by Chief Justice MARSHALL, in *McCullock* v. *Maryland*, the recognition of such a power or necessity at all, would imply the right of courts to absolutely ignore the law altogether, and thereby the creature becomes greater than its creator, and courts could indulge in judicial legislation to their heart's content and become as powerful in this Republic as the omnipotent of the Parliament of Great Britian. For if they could ignore the law and decide according to their own notion in *one* case, they can unquestionably do so in every *other case*, and there would be no restriction or limitation on such powers, even though forbidden to do so by the statutes and organic law of the state or jurisdiction in which they existed as judicial tribunals. We cannot make such a concession as that, for it is repugnant to our whole judicial system, both state and federal. Then these conditions must be made to bend to the law, as prescribed by the Legislative body of that jurisdiction, which, in these cases arising under such statutes, is the Congress of the United States. Congress put those statutes in force in Indian Territory, and the respective tribes, and it is conclusively to be presumed that it knew and understood what it was doing at the time, and thereafter, when it so put them in force, and knew the measure of the rules and provisions of the statutes it enacted. This court has repeatedly held that where Congress or a state adopts the statute of a state, it also adopts the prior

constructions of that statute by the court of last resort of that state and that such construction is binding on the courts and Congress, and that same principle has been recognized and enforced by this same Circuit Court of Appeals, in *Blaylock* v. *Muskogee*, and others heretofore cited. If one of such statutes is enforceable under such rules, then it follows as irresistible that the same rules of construction, or rather the principle thereof, are applicable to all the other statutes, and this and all other courts are bound by the construction given to Chapter 49 of Arkansas by the Supreme Court of that state prior to their adoption. Such a construction is not in accord with the decision rendered in the case of *Shulthis* v. *McDougal et al.*, but *is* in conformity to said other decisions of that same court and the decision of this court.

Again, the opinion proceeds: "They (the lands) did not come to a member of the tribe by inheritance from any ancestor, or could they be spoken of with propriety as a purchase." We are content with the assertion that "they did not come to a member of the tribe by inheritance from any ancestor," for that proposition is surely in accord with the true facts in the case. Then did they come by gift or devise from some ancestor? They did not, according to this decision, for it says "nor could they be spoken of with propriety as a purchase." If they cannot be spoken of as such "with propriety," then they cannot be so spoken of at all as an

estate of purchase. Where would such an estate as this fall, if it is neither one of purchase nor descent? Again, if it is not an estate of *purchase*, then it follows that such lands could not have come to these members either by Gift or Devise from some ancestor, for gifts and estates derived by will, are classed at common law as estates of *purchase*. But under Chapter 49, if such gifts and devises came from some ancestor, the estates upon the death of the intestate without issue, passed back to that ancestor or his heirs, and was classed under said statute as an *ancestral estate*. But this decision holds in effect that such lands did not come to the members of the tribe through *the gift, devise or descent of some ancestor*. If that be true (and we again concede that to be the true state of such conditions), it follows as day follows night that such allotments in the hands of the original allottee were not, and could never be, *ancetral* estates, under Chapter 49 of the Statutes of Arkansas; for under that statute, according to the decisions of the Supreme Court of that state, an estate could never be ancestral unless the same was derived to the intestate by gift, devise or descent from some ancestor. Here is an emphatic conclusion on that case again, unless we recognize the power of a court to absolutely ignore that statute and its prior construction and interpretation, which, in effect, this court held were binding on it and Congress. If binding on the Supreme Court of the United States, it was binding on the

Eighth Circuit Court of Appeals in this *Shulthis* case, just the same as Judges SANBORN, CALDWELL and other such judges considered them binding on said court at the time of the rendition of said other decisions herein cited.

But again, why were not these allotments, in the hands of the original allottees, neither estates of *descent* nor *purchase?* This decision seems not to so hold, for in the next sentence the court observes:

"In applying the statute in this case, therefore, we shall have to proceed by *analogy* only." Does this mean that such a rule is to be applied to a case like the one there being considered, where the so-called allottee died before receiving his estate, and before he was ever entitled to it, because no law existed at the time of his death by which he became entitled thereto, or does it apply to all estates indiscriminately arising in any manner from allotments among the members of such tribes? That case was different from the case at bar, as heretofore pointed out. But in any event, or as to any estate arising under Chapter 49 of Arkansas, can such rule be applied at all? If so, by what authority?

In Vol. 4, Section 374, Kent observes:

> "All the modes of acquiring title to land are reduciable to title by descent and by purchase, or, according to the better distribution of Mr. Hargrave, into title by act or operation of law, and title by purchase, or by the act or agreement of the parties. Whether the agree-

> ment be founded upon a valuable consideration, or be the result of a free and voluntary gift, the property thereby acquired is still, in the eyes of the law, a purchase."

And we presume it will not be denied that this is the uniform and universal classification of titles to lands wherever the English laws prevail, and at all times since they were first put in force, as one of the fundamental rules of real property in English jurisprudence. But whence came the power to create this new specie of title which cannot be classed as either that of descent or purchase? And, too, for that third specie to arise under Chapter 49 of Arkansas, where it was never before discovered to exist under these prior constructions and interpretations of the Supreme Court of that state, thus held binding on all courts, both state and federal? Under these constructions, only two kinds of estates could possibly exist, a fact openly recognized in this *Shulthis* opinion, as above pointed out, and those two kinds of estates are ancestral, and new acquisitions, and not some other estate "by analogy only." This brings us back again to the former proposition that the recognition of such right or power to create new species of estates, and at the same time create original rules to govern them, throws wide open the gate only to let in or out all manner of speculation, and thereby tears down the barriers which have held courts under restraint and limitation for centuries, in the application, construction and interpretation

of statutes and the laws of the land. Since, under these rules and constructions of the Supreme Court of Arkansas, that court has classified all estates arising under Chapter 49 into ancestral and new acquisitions, and as they have been held binding on all courts, we cannot concede that this third specie of titles can come in along with the other two, but must contend that there can be but two species of title arise under said chapter, and they must be either ancestral or a new acquisition, and that all estates in Indian Territory which fall under said chapter at all, must be either ancestral or a new acquisition, and be disposed of according to the provisions of said chapter and the constructions given it by the Supreme Court of Arkansas prior to its adoption.

Again, on page 535, it is again observed:

> "If the mother had been a member of the tribe, then the lands should properly pass to the partents equally."

But where is there any provision in Chapter 49 whereby the father and mother take the estate of their deceased child "equally?" There is one condition in which such a result might arise, and that is where the father and mother owned real estate jointly, or in common, and should make a joint deed to such lands to their child, who, if he afterward died intestate, and without issue, and they should survive him, then the lands would go back to them

jointly as an ancestral estate, for thereby it would become a gift simply, if simply voluntary on the parents part. But even in *that* case, if the child paid any valuable consideration for such lands, as referred to in *Kelly's Heirs* v. *McGuire et al.*, it would then pass as a new acquisition, and not as ancestral. But even then one-half would revert to the father and the other to the mother, if living, and if not, then one-half to the paternal, and the other half to the maternal heirs, just as it was before the gift. We can conceive of no other condition in which the father and mother would inherit "equally" the lands of their deceased child. Section 2531 itself provides, that if the estate came by the father, it must go to the father, and if by the mother, it must go to the mother, etc. But from what source is the notion derived that these parents take "equally," simply because they may happen to be members of the *same tribe?* Chapter 49 makes no such provisions, nor is there anything therein provided about tribes or any other class or cast, but the statute is a general law of descent and distribution for all classes alike. Then where is such a distinction as therein pointed out provided for, and how does it come into existence and by what power or authority is such a distinction created? No Legislature has done so, and the same can be done legally only through legislative power. Again, suppose the parents should belong to *different* tribes? What would become of the estate then? We will

answer that when we come to discuss the *theory* of that case.

As to the conclusions expressed in that decision, and referred to under this second division of the subject, we must still contend that they are not found or founded in Chapter 49 of the Statutes of Arkansas, or the construction given to it by the Supreme Court of that state, and that said decision is not a correct exposition of that statute or the law arising thereunder, and made applicable to the estates of decedents of said territory, and that all such estates must be either ancestral or a new acquisition, and governed by the express provisions of said statute and its prior construction. That under the same, the lands in controversy, and also those of that case, are new acquisitions, and a life estate only goes to the father and mother in succession, with the fee thereof vested in the collateral kindred, as provided in Section 2531.

Let us next pass on to the consideration of other matters on which this *Shulthis* decision of the Circuit Court of Appeals is founded. In point 2 of the syllabus of the case, the same contains this statement:

> "A child whose father was a member of the Creek tribe, but whose mother was not, was born May 6, 1901, and died in November of the same year. He thus became entitled to enrollment in the tribe, but had not received his allotment at the time of his death. *Held*, that, tech-

nically, the Arkansas statute did not apply to the situation, since the land to which the decedent was entitled, and which was the common property of the tribe, did not, strictly, speaking, come to him by grant, inheritance, or purchase, but by a division of lands held in effect by a tenancy in common, to an interest in which he was born as a member of the tribe entitled to enrollment therein, but that, applying the statute by analogy, such land was not a 'new acquisition,' but came to him by the blood of his tribal parent, or, within the meaning of the statute, 'from his father,' and that therefore on his death and the subsequent allotment, his father took the full title, and not merely a life estate."

Thus it seems that such a finding was based on false promises to start with. It is therein shown that this child, Andrew J. Berryhill, was born on the 6th of May, 1901, and died in November thereafter. Yet the court observes, "he thus became entitled to enrollment in the tribe, but had not received his allotment at the time of his death."

Section 28 of the Original Creek Treaty, among other things, provides:

> "All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by the Commission," etc.

Section 7 of the Supplemental Creek Treaty provides:

> "All children born to those citizens who are entitled to enrollment, as provided by the Act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission."

Thus it will be readily seen, that when Andrew J. Berryhill was born, and also at the time of his death, he was not "entitled to be enrolled." Nor was he at any time entitled to an allotment, during his lifetime, nor had he any *right* even to enrollment or allotment. This is a clear case of title by *purchase*, and in no sense whatever can it be one of descent, not even by analogy, if such an estate could possibly exist, for the lands in that case passed directly from the Creek Nation and the federal government, through the patents, to those who would have been the legal heirs of Andrew J. Berryhill, had he died seized thereof, and the word "heirs" used in said treaties is simply *descriptio persona*, and this Supplemental Creek Treaty operated as an original grant of such lands to such "heirs," *Brown* v. *Belmarde*, 3 Kan. 35, point 2 of the syllabus thereof, wherein the Supreme Court of Kansas held:

> "From the death of L., in 1847 or 1848, to the passage of the Act of Congress May 26, 1860, the whole title to the lands in question (Kansas Indian Lands), was in the government, and that act operated as an original grant

to certain reserves and the 'heirs of deceased reserves' mentioned therein. 'Heirs of deceased reserves,' used therein, is *descriptie personae*, and is to be construed with reference to, and determined by, the law at the time the estate passed, and whoever, under the law of the state, would have inherited had L. died May 26, 1860 (the date of the approval of the Act of Congress), are the persons to whose benefit the grant inures" (and *Mullen* v. *United States*, 56 L. ed. 834).

In that case, Congress, in 1825, passed a law by which such Indians were allotted in severalty the *surface* of their reservation, and in 1860, Congress passed the act spoken of, by which the *fee* to such allotments was given the Indians, with this provision as to the "heirs of deceased reserves," which act, and the legal effect thereof, was construed by the Supreme Court of Kansas as above set forth. One Indian who received his surface allotment under the first act, died in 1847 or 1848, and when Congress passed the act in May, 1860, thus granting the fee to the lands, a controversy arose as to whether the heirs who were living at the time of his death in 1847, or those living at the time the Act of 1860 vested the title, should take the lands. That court held those living when the act vested the fee, were the rightful persons to whom the grant inured. So would it have been in the case of Andrew J. Berryhill. Those who would have been his heirs had he lived until this Supplemental Creek Treaty took

effect on the 8th of August, 1902, were the persons who took said lands, by reason of this Supplemental Creek Treaty, and then as an *original grant*, not by any law of descent whatever, but they took exactly the same *kind* of an estate as they *would* have taken had the lands passed to them under Section 6 thereof, which embraced Chapter 49 of Arkansas.

But all the way through that decision, the court seems to have clung tenaciously to the erroneous notion that those lands belonged to the estate of Andrew J. Berryhill, and their decision is based on that idea; but, as a matter of fact, he never owned the same, nor was he at any time during his life, even *entitled* to any lands of said nation whatever, for the law under which those lands were segregated came into existence long *after he had died*, and but for such statute or treaty, none of his so-called heirs would ever have received them, or in any sense of the word been *entitled to them*. There is no disputing the fact that these lands in that case passed directly from the Creek Nation and federal government, and for the first and only time, to those who would have received them by descent had Andrew J. Berryhill lived until that law became effectual and died immediately seized of such lands. But they did not receive them from Andrew J. Berryhill, nor by reason of any right, title or claim he ever had to the same, for as we have shown, he never had any such right, title or interest in his lifetime, and of course he could not acquire any such after

his death. It was simply a gift, not to or by Andrew J. Berryhill, for he was dead before such could thus be given, but it was a gift by such governments to his relatives who would thus have been his heirs had he so lived to have received the lands, and then died vested with the legal right thereto. Then how could such lands be ancestral in any sense of the word or by any process of reasoning capable of an accurate conclusion? It is too plain that they were not ancestral, but a new acquisition in the purest sense of the word; for they did not come from any *ancestor*, or any other human being, but from these governments, and that, too, in the nature of a legislative grant directly to them, and to no other. *Mullen* v. *United States*, 56 L. ed. 834. Being a new acquisition, those lands should have gone to George Franklin Berryhill, the father, for life, with the fee to the collateral kindred, as provided in Section 2531 of Chapter 49, of Arkansas, put in force by Section 6 of this Supplemental Creek Treaty. This was the decision of the Circuit Court of the United States for the Eastern District of Oklahoma, as shown in 162 Fed. 331, which adhered to the construction of that statute for which we are contending. It is axiomatic that there cannot be a vested ancestral estate without the death of the ancestor at common law, and the death of the intestate owner thereof under Chapter 49; and to descend it must have belonged to the decedent from whom it descended. That was not this case, for those lands

never belonged to any one before they vested in those "heirs," and that was after the death of Andrew J. Berryhill, who had never owned them, nor had any right or claim to them.

It is stated on page 532, that "it never was the intent, however, either of the tribe or of the federal government to grant to parties, having a kinsman who had died before the actual making of the allotment, additional lands as a bounty." We must necessarily judge of that "intent" by what was actually done in these cases, and we find that in many cases the kinsmen were given "additional lands," and this *Shulthis* case is a very vivid illustration of it, where these kinsmen got "additional lands" which, in fact, never belonged to "a kinsman who died before the actual making of the allotment" as in that particular case; for, as we have tried to show, he never owned the lands, nor was he entitled thereto. Still, his kinsmen got these "additional lands." There were hundreds of other cases more or less in point, and they got these lands in their own right, and not in the right of some deceased relative, but simply because he would have been entitled to it had he lived. But in such cases the title went directly to such kinsmen from the government, and not through or under "the enrolled member who had died," for in many instances they were not enrolled at the time of their deaths, but the right to enrollment of their kinsmen arose after death. Then, if those kinsmen did not get such

lands, and *in fact their own respective allotments* also, as a *bounty*, how did they get it? Below it is said "the tribe was not bestowing such lands as a bounty, but simply providing for the right of inheritance."

In the first place, this notion seems to have been predicated upon the idea that the "*tribe*" was doing all that was thus being done by which the members of those several tribes were vested with individual rights to their respective allotments. Nothing seems to be farther from the actual truth of these conditions. The "tribe" had practically nothing to do with the allotments of said lands. It was all done at the expense of the federal government, and expressly so provided in these Acts of Congress. It is true, that these so-called treaties, by which said lands were afterward allotted among the members of these tribes, were sanctioned by the tribes through their representatives, but at the same time it must be admitted that Congress had the power within itself to allot the lands among them, even without their consent, as is shown in many Acts of Congress respecting these tribes and many other tribes of Indians situated in other parts of the United States, and as expressly given it by the Constitution of the United States. Not only this, but after Congress had made several futile attempts to obtain agreements to so partition and allot the lands of the Five Civilized Tribes, it became impatient with its efforts and proceeded to parti-

tion them any way, as may be observed in the Curtis Bill of June 28th, 1898. But in that bill, like a kind father would with his children, among whom he was attempting to divide his estate, it gave these tribes one more opportunity to come in and take part in the laws which were to govern them, and dispose of the lands over which they, for years, had been roving. So, such an invitation was extended in said act, and was accepted by said tribes; but it must not be overlooked that in each instance where such so-called treaty was to become a law, Congress *ratified* it, and by that means only, it became the laws which were to govern them, and the courts in passing upon the rights arising thereunder. Congress could have allotted the lands as well *without*, as it did *with*, this co-operation of the tribes through these late treaties. For it has been held by this court that the lands of said tribes are public lands, and that the members of such tribes had no separate or *individual interest* in such lands. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 207, 39 L. ed. 124; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 Law ed. 1041; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 295, 47 L. ed. 190; and *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 136, 48 L. ed. 641. To the same effect and holding are the decisions of the Eighth Circuit Court of Appeals in *Wallace* v. *Adams*, 143 Fed. 716, and *Ligon* v. *Johnson*, 164 Fed. 670. In *Cherokee Nation* v. *Hitchcock*, and in *Lone Wolf* v. *Hitchcock*, 187 U. S. 567, 47 L. ed. 307, and

the recent case of *Tiger* v. *West. Inv. Co.*, 221 U. S. 286, 55 L. ed. 738, it was held by this court that Congress had plenary powers over the Indians and their affairs; and in *Stevens* v. *Cherokee Nation*, point 4, it held:

"An Act of Congress is not unconstitutional because it supersedes a prior treaty." To the same effect are the other two cases above cited. And in *Wiggins* v. *Connolly*, 163 U. S. 56, 41 L. ed. 69, Congress had placed restrictions back on allotted lands to Indians, *after* the former restrictions thereon reserved in the treaty for allotment had expired, and thereby prohibited such lands being sold until the expiration of the later restrictions; and this Supreme Court held that Congress had power so to do.

It may be conceded without injury to our cause that these tribes had the undisputed right to occupancy to the lands of their respective tribes under these original patents to the respective tribes, and had power to make laws among themselves not inconsistent with the Constitution, laws and treaties of the United States, for the protection and regulation of their domestic affairs and disposition of their personal property and individual rights in such personal property and occupancy; but that is far from conceding that they, or even said tribes, singly or combined, had any vested right in the fee simple title absolutely under their control and disposition. For in fact, neither said tribes or members

owned such rights, nor could they make any disposition whatever of the fee to any of said lands by sale, partition or otherwise.

For the purpose of this suit, it is wholly unnecessary to examine the title to any of said lands other than those of the Creek Nation, as these lands in the case at bar, and those in the *Shulthis* case, were situated in that nation.

In the original grant of the federal government to the Creek tribe, dated the 11th day of August, 1852, the same recites: "The right thus granted by United States shall be continued to said Tribe of Indians so long as they exist as a nation and continue to occupy the country hereby assigned them." And the granting clause thereof is in the following words:

> "*Now, know ye*, that the United States of America, in consideration of the premises, and in conformity with the above recited provisions of the treaty aforesaid, have given and granted, and by these presents do give and grant unto the said Muskogee or Creek Tribe of Indians, the tract of country above described. To have and to hold the same unto the said Tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them."

This grant was made pursuant to Article III of the Treaty of 1833, and so far as we know, is all the patent that was ever given for the lands of the Creek Nation. Different parts of the original grant

were disposed of, and by the consent of government, to Seminoles, etc. But the tenure by which the Creek Nation held the remainder was never changed. On the contrary, by an express provision in Article 3 of the Treaty of 1856, it was expressly therein provided that "the same shall respectively be secured to and held by said Indians (having reference to the Creeks and Seminoles therein being provided for as provided in said treaty), by the same title and tenure by which they were guaranteed and secured to the Creek Nation by the fourteen articles of the Treaty of March twenty-four, eighteen hundred and thirty-two, the third article of the Treaty of February fourteenth, eighteen hundred and thirty-three, and by the letters-patent issued to the said Creek Nation on the eleventh day of August, egihteen hundred and fifty-two, and recorded in volume four of records of Indian deeds in the Office of Indian Affairs, pages 446 and 447."

By Article 10 of the treaty with these Creeks, proclaimed the 11th of August, 1866, it is provided:

> "The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and protection of rights of persons and property within the Indian Territory: *Provided, however*, said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges and customs."

But it will be observed that this proviso relates only to the "*present*" tribal organization, laws, etc.; and the time came when "Congress and the President of the United States" deemed it "necessary for the better administration of justice and protection of rights of persons and property within the Indian Territory" to enact other laws and substitute other provisions to meet the conditions existing in said Territory, and proceeded to do so by these recent enactments, and, fianlly, entirely abolished the laws and courts of all these Indian tribes in said Territory in its enactment known as the Curtis Bill of June 28, 1898.

So that it became a matter not only of the greatest importance, but keenest interest, as to what rights and interests passed by the grant to the "Muskogee or Creek Tribe of Indians" of August the 11th, 1852, and subsequent treaties, pertaining to the lands of the Creek Nation, and to whom or what did such rights pass thereunder. It has already been shown by these decisions of the Supreme Court and Circuit Court of Appeals of the United States, that the lands did not pass to the individual members of these tribes. So *that* feature is eliminated. But to whom did the lands go, if the title thereto passed at all? It is plain on the face of the letters-patent itself that the grantee therein was this "Muskogee or Creek Tribe of Indians." But what was this Tribe of Indians, and what was its capacity to take property, and how was it regarded by the fed-

eral government at the time of this grant, and afterward? It is a well known principle of law, that before title to real property can pass by deed or grant, there must be a legal entity to take it, either in the person of a human or a corporation; and must have a legal capacity to accept or reject the property so presented. Of course, there are cases where such acceptance may be presumed in law, but they are the exceptions to the rule. *Hall* v. *Russell*, 25 L. ed. 829, where this court pointed out that there could not be a grant without a grantee, and not a present grant without a present grantee.

In *Davidson* v. *Gibson*, 56 Fed. 443, Judge CALDWELL, in delivering the opinion of the Circuit Court of Appeals, observed:

> "The Creek Nation has been long recognized by the United States as a 'domestic dependent Nation' (*Cherokee Nation* v. *Georgia*, 5 Pet. 1); as a state in a certain sense, although not a foreign state or state of the Union (*Holden* v. *Joy*, 17 Wall. 211); as a distinct community, with boundaries accurately described (*Worcester* v. *Georgia*, 6 Pet. 515); and as a domestic territory (*Mackey* v. *Coxe*, 18 How. 100.)"

But in *Worcester* v. *Georgia*, and numerous other cases, it has been held by the Supreme Court of the United States that the original rights of Indians to the lands were simply that of *occupancy*, with the fee thereof in the United States, and was

so held in *Beecher* v. *Wetherby*, 5 Otto 517, 95 U. S. 24 L. ed. 440, point 3, where it is said:

> "The right to such land by the Indians was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them when they chose."

And in *Johnson* v. *McIntosh*, 8 Wheat. 543, it was held by the same court that a purchase of lands by individuals from an Indian tribe, did not pass the title to the land, and such individuals were not entitled to be heard in that court on the strength of such title.

So, from these decisions, it will be observed that the Creek tribe gave up nothing in Georgia and North Carolina, from whence they came, other than the right of the occupancy of the lands which they ceded to the federal government in exchange for the lands in the present Creek Nation; but it may be conceded that they parted with this right, which was property in the true sense of the word under the law as it then existed, and received in lieu thereof the lands described in said letters-patent and the hundreds of thousands of dollars provided for in said original treaties. Thus it is shown that the nature of the title they surrendered was simply that of *occupancy*, which did not carry with it the fee, for that was even then in the federal government, and not the Creek tribe. This was true with all the Indian tribes in the United States. They did not own the fee to the lands over which they roved at

will, but they did own the right of occupancy, which was recognized and respected as property by the government, and this could be extinguished only by purchase on the part of the government, or by voluntary abandonment thereof by the Indians; *Leavenworth, etc., R. R. Co.* v. *United States*, 2 Otto 733, 23 L. ed. 634.

So then, what rights did the Creek Nation get under this grant and these original treaties with the government? This is answered in the case of *Ligon* v. *Johnson*, 164 Fed. 670, and *Fleming et al.* v. *McCurtain et al.*, 215 U. S. 56, 54 L. ed. 88, and other cases to the same effect heretofore cited.

That of *Ligon* v. *Johnson* was a case where a number of citizens of the Choctaw and Chickasaw Nations, mixed bloods, partly Indian and partly negro, brought suit in the United States Court for the Southern District of Indian Territory, maintaining, in substance, that they, being enrolled as negroes, were improperly enrolled, and should have been enrolled as Indians, whereby their allotments would have been the same as other Indians of such tribes, instead of being allotted as negroes, whereby they received or would receive, only 40 acres; and, *second*, set up a claim that the lands of these nations was in the nature of a trust for the use and benefit of the original citizens, and their descendants, under the original patents and treaties of these Indians with the Government. But the Circuit Court of Appeals of the United States held:

"The lands granted by the United States to the Choctaw Nation, March 23, 1842, 'in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it,' pursuant to the Treaty of September 27, 1830 (7 Stat. 333), in which land the Chickasaw Nation obtained an interest in common with the Choctaws by a treaty between them made January 17, 1837 (11 Stat. 573), became public land of the two nations, and not the property of their individual members, and the disposition of such lands as tribal property was within the domain of Congress, whose action in that regard by Act April 26, 1906, c. 1875, 34 Stat. 137 (U. S. Comp. St. Supp. 1907, p. 867), which provided for individual allotments, the disposition of unallotted lands, and the distribution of the proceeds between members of the tribes, as shown by an enrollment to be completed and approved by March 4, 1907, is conclusive upon the courts, *which have no power to revise such enrollment.*" (Italics are ours.)

It will be observed that Judge Hook, who concurred in *Shulthis* v. *McDougal*, wrote that opinion, whereby he expressed himself in a very clear and direct manner as to these jural rights. In the body of the opinion, he observes:

"The lands involved were public lands belonging to the Choctaw and Chickasaw Nations, and not to the individual members, has been assumed without contradiction from the inspection of their titles through a long sequence of Act of Congress and treaties and agreements with the tribes. True, as contended, the title

so held has frequently been referred to as being held in trust for the members of the tribe, but it is so only in the broad, comprehensive sense in which the public property of any representative government is in trust for the welfare of its people. Until specific, private, individual rights attach pursuant to law, the enforcement of such trusts must be at the bar of public conscience. They are not justiciable in the courts. The disposition of the tribal property of the Indian tribes falls within the legislative domain, the power of Congress is supreme, and its action is conclusive upon the courts. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 295, 23 Sup. Ct. 115, 47 L. ed. 183; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. ed. 299."

The case of *Fleming et al.* v. *McCurtain et al.* was along practically the same line as *Ligon* v. *Johnson*, and with practically the same result. That case was where about thirteen thousand Choctaw and Chickasaw citizens conceived the notion that, under the same grant and treaties, they were the true owners of the fee to all the lands in said nations, and instituted that suit for the purpose of enjoining the Secretary of the Interior, the Dawes Commission and others from further allotment of said lands and undoing what had already been done under these Acts of Congress, and having said lands declared a trust fund for their individual use and benefit, claiming that they were the original citizens and their "descendants," to whom said lands were under said grant and treaties granted, in ef-

fect, in "fee simple." But the Supreme Court of the United States took an entirely different view of the matter, and held that such grant and treaties did not give such citizens any individual rights whatever in said lands; and held further, in effect, that the title so held by said tribes was simply a base fee, subject to the will of Congress. The court will observe that the wording of the granting clause in this Choctaw grant is the most favorable of any of such grants to the notion of a "fee simple" estate passing thereby to such citizens; but the Supreme Court construed even that clause not to pass the fee to such citizens. The syllabus of that case is as follows:

> "No trust in favor of the then existing members of the tribe and their descendants was created by letters patent which, following the language of the Choctaw Treaty of September 27, 1830 (7 Stat. at L. 333), Art. 2, under the authority of which the patent was made, granted the Choctaw Nation a tract of land 'in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it,' *but such grant was one to the nation only, limited in point of time to the corporate existence of the nation.*" (Italics are ours.)

In discussion of this last feature, this court observed:

> "How far any one was from the understanding, or from doubting that all the rights granted by the United States were in the Choc-

taw Nation, is shown by the treaty with the Chickasaws, upon which the plaintiffs rely. The nation had no right to make that treaty as it did, if it was subject to the trust supposed. Again, the limitation of time, 'while they exist as a nation and live on it,' shows that the grant has reference to the corporate existence of the nation as such, and very plainly qualifies the absoluteness of the earlier words, 'in fee simple.' The suggestion that it limits the duration of the legal title only, but leaves a trust outstanding, is simply arbitrary. If the plural signifies the members of a class constituted *cestuis que trust*, the limitation would attach to the trust. But the only answer necessary is that as such separation or intent can be discovered in the words.

What we have said shows another significant answer to the plaintiff's claim. They say and argue, as they must, in order to make out their right to a distribution to themselves, that the Choctaws and Chickasaws no longer exist as nations. But, if so, the grant also was at an end when the nation ceased to be, and it rested with the bounty of the United States to decide what should be done with the land, except so far as it already had been decided by treaties or statutes upon which the plaintiffs do not and cannot rely. It is said that, by Article 18, in case of any well founded doubt as to the construction of the treaty, it is to be construed most favorable to the Choctaws; but there is no well-founded doubt, except whether the construction contended for would have been regarded as favorable to the Choctaws, since it would have cut down the autonomy that the treaty so carefully expressed. See, further, *Stephens* v.

Cherokee Nation, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 19 Sup. Ct. Rep. 722; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568, 47 L. ed. 299, 307, 23 Sup. Ct. Rep. 216."

By this last decision of the Supreme Court of the United States, these matters are forever set at rest, and from which there is no appeal. Then if the several members of these tribes had no individual interest in the lands under these grants and the original treaties leading up to the grant and if the grants were to the nations alone, and passed only base or qualified fees to such lands, "limited in point of time to the corporate existence of the nation," and "the grant also was at an end when the nation ceased to be, and it rested with the *bounty* of the United States to decide what should be done with the lands;" as so held in the *Fleming* case, then it follows as also conclusive that this grant to the Creek Nation on the 11th of August, 1852, was also a base fee to the nation only, to endure for the same time and under the same conditions as the Choctaws, for, in said grant there are no such words as "in fee simple, to them and their descendants;" but the limitation therein provided is "*to have and to hold the same unto the said Tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them.*"

It must be admitted that the duration of time during which the Creek tribe (as well as the other tribes) "shall exist as a nation," depended absolutely upon the will of Congress of the United States, under its plenary powers bestowed upon it by the Constitution of the United States, and so held by the decisions of the Supreme Court of the United States hereinbefore cited. It, therefore, follows also that all such matters pertaining to such tribes were under the absolute control of Congress and the allotments of said lands and the distribution of the proceeds thereof, and the future use and benefits to be derived therefrom, were all under the direction and authority of Congress alone, and subject to its own enactments, and not upon any authority or right of the tribes.

So, we take it, that this notion advanced upon page 532, and all through the *Shulthis* decision, that "*the tribes*" were directing the course of such events and making the disposition of such lands, is not well founded, but erroneous.

This view is further corroborated by the express provisions of this Creek Treaty of 1866.

Under the 10th Article thereof, it provides:

> "The Creeks also agree that general council, consisting of delegates elected by each Nation or tribe lawfully resident within the Indian Territory, may be annually convened in said Territory, which council shall be organized in such manner and possess such powers as are hereinafter described."

Section 1 thereunder, provides for taking the "census, or enumeration of each tribe lawfully resident in said Territory," "under the direction of the Superintendent of Indian Affairs," who was empowered to appoint competent persons for that purpose, whose compensation was to be "fixed" by the Secretary of the Interior, and "paid by the United States."

Section 2 thereof, provided for the manner of election of said delegates, according to this census so taken, as provided in the first section; and, provided further, that such session should continue for 30 days at each annual session, and that no extra session should be called except "in the judgment of the Secretary of the Interior the interest of said tribe shall require."

Section 3 prescribes the powers and authority of such council, as follows:

> "Said general council shall have power to legislate upon all rightful subjects and matters pertaining to the intercourse and regulations of the Indian tribes and nations resident in said Territory, the arrest and extradition of criminals and offenders escaping from one tribe to another, the administration of justice between members of the several tribes of said Territory, and persons other than Indians and members of said tribes or nations, the construction of works of internal improvement, and the common defense and safety of the nations of said Territory. All laws enacted by said general council shall take effect at such time as may

therein be provided, unless suspended by directions of the Secretary of the Interior or the President of the United States. No law shall be enacted inconsistent with the Constitution of the United States, or the laws of Congress, or existing treaty stipulations with the United States, nor shall said council legislate upon matters pertaining to the organization, laws or customs of the several tribes, except as herein provided for."

Section 4 provides:

"Said council shall be presided over by the Superintendent of Indian Affairs, or, in case of his absence from any cause, the duties of said superintendent enumerated in this article shall be performed by such person as the Secretary of the Interior may direct."

Section 5 provides for the appointment of a secretary of such council by the Secretary of the Interior, whose duties require him to make an accurate record "of all the proceedings of said council," and transmit the same, duly verified by said superintendent, to the Secretary of the Interior, "immediately after the sessions of said council shall terminate."

Section 6 provides that said members of the council shall be paid by the United States, and Section 7 thereof is as follows:

"The Creeks also agree that a court or courts may be established in said Territory, with such jurisdiction and organization in such manner as Congress may by law provide."

Article 11 provides that said treaty shall be a full settlement and adjustment of all matters in difference between said Creek Nation and the United States.

By Article 12, the United States reaffirms its prior agreements with said nation, etc., not inconsistent with said last treaty.

Article 13 appropriates lands, not exceeding 160 acres, to religious societies or denominations, etc.

And Article 14 thereof is as follows:

> "It is further agreed that all treaties heretofore entered into between the United States and the Creek Nation which are inconsistent with any of the articles or provisions of this treaty, shall be, and are hereby, rescinded and annulled; and it is further agreed that ten thousand dollars shall be paid by the United States, or so much thereof as may be necessary, to pay the expenses incurred in negotiating the foregoing treaty" (which is the last of said treaty of said date).

Thus it will be seen that the powers of this council were very limited, and confined to their domestic affairs, intercourse among the tribes, etc.; that their deliberations were to be presided over by a federal officer who, together with another federal officer thereof, was to immediately report their proceedings to the Secretary of the Interior, and that the laws thus passed were subject to the approval of such Secretary of the Interior or the President

of the United States, who, by disapproval, could thereby veto them. Not only that, but there were certain other matters upon which they were expressly prohibited from legislating, namely, that "No law shall be enacted inconsistent with the Constitution of the United States or the laws of Congress, or existing treaty stipulations with the United States, nor shall said council legislate upon matters pertaining to the organization, laws, or customs of the several tribes, except as herein provided for."

Not only this, but under the last article of such treaty, all treaties theretofore entered into between the government and the said Creek tribe, inconsistent with the provision of said treaty, were "rescinded and annulled." And it still goes further and provides in said Section 7 thereof, that "the Creeks also agree that a court or courts may be established in said Territory, with such jurisdiction and organization in such manner as Congress may by law provide."

If Congress never before possessed the right and power to divide said lands in severalty among the members of the Creek Nation, by alloting them either in fee, or simply by surface allotments, as it proceeded to do in the Curtis Bill, would not this provision give such rights, together with the right of such courts over such matters along with others, as Congress saw proper to enact? Here is an express provision, by which Congress may establish

such courts in said territory as it deemed proper. But, as we have shown before, in speaking of this Treaty of 1866, the power of Congress to legislate over such matters was given in the first part of said Article 10 of said treaty.

But to all this it may be truthfully said that Congress never had parted with the fee simple title to the lands of this, or another tribe under or by reason of such grants, but owned such title ever since the Louisiana Purchase, subject to the right of occupancy only of these several tribes under these respective grants to the Five Civilized Tribes. Then, we are back again to the fact that it was the Congress of the United States which was allotting these lands among the tribes, and not the *tribes themselves*.

So on this feature of the tribe accomplishing such matters, as pointed out in this *Shulthis* decision, we respectfully submit that the theory on this point also was erroneous and untenable.

Then as the fee to these lands had always belonged to the United States, subject only to such right of occupancy under the letters patent, and as Congress had plenary powers, given it not only by the Constitution of the United States, but also by this Creek Treaty of 1866, to legislate for the Creek tribe as it deemed proper, how can its enactments, and the accomplishments thereunder, be credited to "*the tribes?*" And, too, why could not

Congress allot these lands in severalty, either in fee or surface occupancy? It is too plain that Congress alone had that power and right, and that the tribes did not have such powers, and when the lands were thus allotted it was the Act of Congress alone. Then, again, we ask: If the fee to the lands never at any time belonged to the members of the tribes before these recent allotments, nor to the Creek tribe, except in a qualified way, as pointed out in the decision of the Supreme Court of the United States in the *Fleming* case, and then subject in duration to the will alone of Congress, but *after* the allotments each member is clothed, not only with the right of occupancy, which alone was all he enjoyed under the letters patent, even had Congress allotted the surface rights thereto, but likewise with the very fee simple title itself, a thing he never had before, nor had he any right to it even in the slightest degree, where did the fee come from if it did not come as a "bounty" from the federal government? The Indian never had it before, and was never entitled to it, but that he now has not only the right of occupancy, but the fee, no one can deny. There was only one place from which to come, and that was the federal government, which owned it. But what consideration did the allottee pay for it? It may be said that under the grant the members formed the tribe, and that the tribe under the grant had the right to the occupancy of the land, which was a property right of which Congress itself could not

deprive them under the provisions of the grant. We will concede that proposition, but still that would not be an answer to the question, for the reason that unquestionably Congress had the power to break up this condition and legislate for the tribes as it saw proper, given it by the Constitution and this Treaty of 1866, and it could have carried out the provisions of the Curtis Bill, by which the surface alone was to be allotted, the fee thereof being expressly reserved, as provided in Section 11 thereof. This would have been consistent with the powers of Congress thus given, but it would not have vested in the allottee the *fee* to the allotment thus assigned to him, but only the right of occupancy thereof which, upon his death, would have perished with his body, and the title to his allotment would have still remained in the government, as it ever had been. It cannot be said that the consideration on the part of the members was the relinquishment of this right of occupancy, *first*, because the right of occupancy was to the *tribe*, not to the *individual members; second*, because, as we have shown, Congress had the legal right to allot the lands just as it did, witout infringing upon any legal rights either of the tribe or its members. Consequently, there was no concession of any legal right whatever on the part of the tribe or its members, and, therefore, there could have been no consideration whatever passing from the tribe or its members to the United States, as a valuable consideration for what the

members got from the government free in the partition and allotment of the lands. As to the several possessory right of occupancy in each allotment, which is all each member could have received had Congress allotted the surface under the Curtis Bill, each allottee received in the allotment so made, but he not only received the right to the *possession* of his allotment, but he likewise was vested with the *fee thereof*, an estate of greatest value to him and heirs but which he never had before, and never had any right to, either by purchase, inheritance or otherwise. As to the fee to such lands, each member was no more entitled to the same than was any other human being, but *after* the allotment, he became the absolute owner thereof in fee simple, and on his death seized thereof, it passed by the laws of descent which Congress put in force in said territory, to his heirs—a right which said heirs never before had in or to said lands. And now being so vested with such legal and absolute title, there is no power on earth which can *legally divest* him thereof against his will. Where did these new legal rights, never enjoyed before, come from? It is too plain for dispute that this fee came alone from the Government of the United States, and without any consideration whatever except that fatherly solicitude which the government has always entertained and indulged in toward the Indian tribes.

It follows as indisputable that the fee or title to such lands was, therefore, nothing more nor less

than a gift, pure and simple, from the federal government to the original allottee, in each and every allotment, and as it is the title to the lands which must fix its character on the death of the owner, and as that *title* came alone from the federal government simply as a *gift*, such lands, on the death of the original allottee, intestate and without issue, descend as *new acquisitions* under Section 2531 of Chapter 49 of the Statutes of Arkansas, and *not* as an *ancestral estate*. It is absolutely as clear cut case of a new acquisition as can possibly be imagined; for, under said chapter, an ancestral estate MUST come from some *ancestor* or blood relative, either by descent, devise or gift. There is no other possible way for such an estate to arise, but it will never be contended that the federal government is or was the *ancestor* either of Andrew J. Berryhill or Waitie Washington, or that the lands in either case came to the decedent by or through any blood relative, for no human being ever had either tract before the allotment by which the title was vested for the first time. These lands, on his death, unquestionably passed as a new acquisition to the children of plaintiff in error, with a life estate to the father and mother, and the decision in this case is plainly erroneous and should be reversed.

But, on the same page, it is contended that Congress itself has construed this chapter, and quotes Section 5 of the Act of April 26, 1906, but we see nothing whatever in that section which can hold out

with the notion that such allotments are ancestral. The first provision provides for patents or deeds "hereafter issued." This fits neither the case at bar nor the *Shulthis* case, for in each case the patents had been issued before that act was passed, leaving the lands to be disposed of according to the law as it existed at the time of their deaths, and the land in this *Shulthis* case did not come into existence until after the death of Andrew J. Berryhill.

The second provision does not suit either case, for practically the same reason, and the third is the same. And if by the last provision it was intended by Congress or anyone else to apply to such cases, wherein it provides, "and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect," then we answer it can have no operation in the case at bar or the *Shulthis* case, *first*, as to the case at bar, because said son had received his patent before he died; and, *second*, as to both estates, the title thereto had already vested, and as to the *Shulthis* case, long after the Supplemental Treaty was enacted, in which cases the title had vested long before this Act of April 26, 1906, was passed, and Congress has no more power to divest a vested right in lands, than has a court or any other body, *Meehan* v. *Jones*, 175 U. S. 1; *Choate* v. *Trapp*, 56 L. ed. 941.

It is true that an Act of Congress or any other legislative body may construe a prior act of the

same body, but we see nothing in the section cited whereby Congress, in any sense of the word, attempts to construe Chapter 49 of Arkansas, which had been finally construed long before Congress put the same in force in Indian Territory. Again, we deny the right of Congress or any other body to so change the construction of a statute that its last construction would operate to divest vested rights under the old settled construction given the statute, and whereby that construction had become a rule of property and under which such rights had vested.

We insist that the construction of said chapter as it existed in Arkansas prior to adoption, is the rule by which the rights of the plaintiff in error are to be measured—not some new notion that might come up afterward.

On page 533, the decision again repeats that "the tribal lands belonged to the tribe," but we have tried to show by the laws we have cited that said lands did not belong to the tribes; at least in a very limited way can it be said to be a property right, and that only a right of occupancy "limited in point of time to the corporate existence of the nation;" *Fleming* case.

It is also pointed out that the legal title stood in the tribe as a political society; that they were the home or seat of the tribe and its members; that each member could dwell thereon and partake of the tribal property; that "the Constitution of the Five

Nations provided that their lands should remain 'common property,' but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them;" that such improvements meant not only betterments, but occupancy; that they passed from father to son; were subject to sale except to the United States, etc.; that "under such regulations," the members of the Creek Nation had been "in possession of homes on their tribal lands for more than half a century," and that the lands not occupied in severalty and the tribal funds, were "treated as belonging to the members."

We may admit that all this was practically true, for we presume that no one would deny that the Creek Nation did not have its local organization, with legislative, judicial and executive branches, modeled in a fashion after the states and federal Union. Not only this, but they had their "bands," their chiefs, warriors, band chiefs, etc. But where did this source of power and authority arise? Do we not read specific provisions for them in this Treaty of August the 11th, 1866, heretofore cited, and portions thereof set forth in this brief? Is it not there conclusively shown that such matters were limited to the temporal affairs and the intercourse among such tribes? And all such proceedings presided over by a federal officer, and reported to the federal government, and as to certain rights and

subject matters were expressly forbidden to legislate at all? Among the prohibitions they were forbidden to pass any laws in violation of the Constitution, laws of Congress or prior treaty stipulations with such tribes, etc. As before stated, by that treaty, Congress was expressly given power to pass such laws as it deemed necessary for the betterment of the conditions of such people and the property. But the decisions of this court we have cited, and especially *Fleming* v. *McCurtain*, have conclusively established that these members had no several or vested rights in the fee simple title to such lands, and even the tribal title thereto was "limited in point of time to the corporate existence of the nation." Just how long that "corporate existence" should endure, *depended absolutely upon the will of Congress*. Then, why lay so much stress upon these temporal affairs of the tribe and the use they had made of the surface under their right of occupancy, and apply them to the fee and disposition of the fee by the Congress of the United States? If such an occupancy and improvement of a certain tract of land, even for "half a century," gave such member an "indefeasible" right to the *title* to the lands thus occupied, how is it that Congress, under the Original and Supplemental Treaties, made express provisions by which such citizens could select such lands as their allotment for themselves and family, *provided* they would do so in 90 days, and, *provided further*, that each allotment was not to exceed 160

acres, and in case the same was not so selected within the 90 days, others could select it and become vested with the title (Sec. 5 of the Original Treaty)? If the title to such property was already vested, or even the *right* to such property, it was no more in the power of Congress to divest such rights and take them away from such member, than any other body, *Meehan* v. *Jones*, 175 U. S. 1, and cases therein cited. We believe there was a little too much *emphasis* on these minor features.

Again, on page 534, it is stated: "While the legal title to the tribal property belonged to the tribe as a political society, the beneficial use of the same had at all times belonged to the members in severalty." Certainly. But the "tribal property," so far as the *lands* were concerned, was simply nothing more than "the beneficial use of the same." For the members did not own the fee, and could not make any disposition of the same whatever, neither collectively nor singly. They had no more right to the fee of these lands under this grant and treaties, than would a roving Indian have to the fee of his reservation. In fact, these grants were simply another form of an Indian reservation, and vested no individual rights to the fee simple title whatever.

Again, it says: "It was to such a condition of life and property as this that the plan of allotment here involved was to be applied." But by whom? By the Congress of the United States—not the In-

dian tribes; but when the test was put to the character of the estate of the respective members in such "property" in the lands, it was found that the members had no interest in the same which they could assert in a court of the land, as shown by the cases cited. It then observes: "To carry out the scheme, the *law* first proceeds on the one hand to ascertain the membership of the tribe," etc. What *law* was that? The law of *Congress*—not the tribe; and that law was commenced in March, 1893, perparatory to winding up these Indian affairs, and of its own volition—not by the permission of the tribe or its members.

The opinion then observes:

> "The right to such share is not created by the statutes, but is simply recognized and enforced by them. The several agreements and Acts of Congress are not concerned with the legal title, but go back to the actual beneficial rights of property as they had always existed in Indian Territory."

But, by the decisions of the Supreme Court of the United States in *Stephens* v. *Hitchcock*, *Delaware Indians* v. *Cherokee Nation*, and others we have cited, it was thereby held that these members had no such thing as "beneficial rights of property" in the fee of such lands, or "the right to such share" of these lands; and in *Fleming* v. *McCurtain*, that court again held the same thing, and went further and held that even the tribe had only a base or qual-

ified fee which was to endure only so long as Congress should permit; for it held that "*such grant was one to the Nation only, limited in point of time to the corporate existence of the Nation.*" The "corporate existence of the Nation" was a matter left absolutely with Congress alone, despite what the "Nation" or its constituents might desire, and Congress could disbandon the tribes at any time it saw proper, and did in said late Acts, and especially in the Curtis Bill, provided for such dissolution, and on the 1st day of July, 1914, did disband the tribal relations of the Cherokee Nation. If such members did not have such "shares" before the allotment of the lands, and did not have any right to the same or any other interest in the fee or control over the fee, but did get the fee to their several "shares" on the allotment of the lands under the Original and Supplemental Creek Agreements, where did they get it if it did not come through these late Acts of Congress? It is plain that they did not have them before, but got them under their patents—a thing, as we have said, they never had before, and to which they had no right. But why say, under the light of these decisions, that "the several agreements and Acts of Congress are not *concerned with the legal title*"? Was it not "the legal title" to the very lands that Congress was thus disposing of by these Acts and the allotment in severalty among the members, and thereby vesting each of them in the fee to his own allotment—the very thing the Supreme

Court of the United States had, by these several decisions cited, declared they did not have before? And in *Fleming* v. *McCurtain*, that the title which the Nations alone held was nothing but a base fee? This notion here advanced in this *Shulthis* decision, that these lands were held in *trust for the benefit of the members*, has been exploded by the Supreme Court of the United States, and this very court itself, in *Ligon* v. *Johnson*, in which that theory was advanced as one of the grounds of jurisdiction of the courts and rights of the plaintiffs therein. But in that case Judge Hook, who delivered the opinion, and concurred in the *Shulthis* decision, refused to countenance such a theory, and held against the contentions of the plaintiffs therein. Again, the same thing was advanced in *Fleming* v. *McCurtain*, and met the same result in the Supreme Court of the United States. And the court will take notice that the decision in the *Fleming* case was rendered after this *Shulthis* decision. Then, again, Section 3 of the Original Creek treaty provides:

> "All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission, so as to *give* each an equal share of the whole in value, as near as may be, in manner following: * * *"

Is not here a direct and express provision of Congress, whereby these allotments were made "gifts," and the fee thereto expressly provided for? Here is unquestionably an express provision by

which the allotment was created, and the Commission is directed to allot the lands "so as to give an equal share of the whole in value." Then, why say "the right to such share is not created by the statute"? And that "the several agreements and Acts of Congress are not concerned by the legal title"? Other Acts of Congress leading back to 1893 and thereafter, lay the foundation for the allotments of these lands in severalty among the members of these tribes, so as to "*give* each an equal share," and vest him for the first and only time with the *title* thereto; but it would serve no useful purpose to go into detail here by pointing out each specific provision thereof.

Again it says:

> "They require allotments to be made so as to save to each member his improvements, *including his right of occupancy.*"

Here, again, is the "right of occupancy" mentioned, but all through that decision "the right of occupancy" and the right to the *fee* are confused. They are distinct rights—the right of occupancy belonged to the members of the tribe so long as the tribal relations with the Government existed under the grant; but the *fee* to the lands themselves always belonged to the Government, and was always under its control and final disposition.

Again, it says:

> "While the *tribe*, in carrying out the project, grants the legal title to the property, it

> does not confer the right to that property. The Act by which the distribution is made is spoken of, not as a grant, but as an allotment."

Here, again, is advanced the notion that "the tribe" is "carrying out the project," and "grants the legal title to the property;" and, on that notion, that whole decision is based. But this grant to the Creek Nation, this treaty with that tribe of 1866, and other treaties, and the Acts of Congress relative to the lands and tribe, together with the decisions of the Supreme Court of the United States, we have cited, refute any such a notion, and it will serve no useful purpose to again refer to that feature of this case. The short of this whole matter is, that the tribe had nothing but the naked title, with a base fee under the grant, and with no power on earth to do anything with the title thus held, and the members of the tribe had nothing whatever in the fee, but enjoyed simply the right of occupancy, as they had done in the lands of their nativity, from whence they had originally come. Below this, the opinion further observes:

> "So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private separate estate, for the constitutional policy of the tribe was ownership in common."

Here is an open recognition that the several members had no right to have his separate share set off to him in kind; but this was not because the

constitutional policy of the tribe was "ownership in common," but because such members had no several and individual interest in the lands, as held so often by the Supreme Court of the United States, and because the *tribe* held only the dry trust in the title, with no power to do anything, and subject to the will of Congress as to duration, and upon the dissolution of which, even the title would become extinct, as so held in *Fleming* v. *McCurtain*.

This "constitutional policy of the tribe," to hold in "common" the lands they possessed in right of occupancy (and none other), related simply to such occupancy, and not to the fee; for, in fact, under the grant and the terms of this treaty of 1866, the rights of government of the tribe were mighty little, indeed, and related only to temporal matters, and was prohibited to extend to the fee of the lands. Under no law or grant had the tribe anything to do with the fee simple title to the lands, nor had the members any individual interest therein. So, whatever was done which led to the allotment of the lands in severalty, and thereby vested the fee thereto in each allottee in fee simple, was the Act and gift of the Congress of the United States, and not the tribe or its members. They took title to their allotment in fee, just as the child takes title to lands given him by his father, and practically on the same consideration, namely, love and affection of the Government for its wards. But in so doing, the quality of an *ancestral* estate is not stamped upon such al-

lotments given these members by Congress, as would be in the case of the father; because the Federal Government is no blood relation to these allottees, and although the allotments passed to them under the laws alone of Congress, and thereby became purely a gift of that Government, they passed as new acquisitions in and to the original allottees, and, upon their death, intestate, and without issue, they descend, under Section 2531 of said Chapter 49, as new acquisitions to his heirs, and must be distributed accordingly.

In fact, the court seems to have had no trouble whatever in arriving, in the first instance, at the same conclusion here advanced by the plaintiff in error, for, on page 533, the opinion expressly declares:

> "They (the lands) did not come to a member of the tribe by inheritance from ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only. The tribal lands belonged to the tribe."

Here, again, is this erroneous view that the lands belonged to "*the tribe;*" and upon the erroneous notion, this idea of "*analogy*" *comes in*, and is thereafter made the gist of that whole decision. It must necessarily follow that if the premises are wrong, the conclusion based entirely upon such premises will also be wrong. And so it is in that case. If the lands "did not come to a member

of the tribe by inheritance from an ancestor," as so declared in that decision, then it follows, as before said, that such lands in the hands of the original allottee, cannot possibly be an ancestral estate, either at common law or under Chapter 49 of the Statutes of Arkansas; for at common law, to be ancestral, they must *descend from an ancestor;* and under Chapter 49, they must come to the intestate from some blood relative by *descent, devise or gift*, and they could come in no other way. And as Chapter 49 was the law of descent which must govern the descent of all such estates, there is no escape from the positive fact that all such estates are either *ancestral* or a *new acquisition*. If not ancestral for the reason first suggested in said opinion, then they *must* be new acquisitions; for it could not be otherwise under the terms and conditions of that chapter. We cannot concur in the notion that the courts have the power, under that chapter, to create a new species of estates by "anlogy," or in any other manner. For if they can, then their powers are unlimited in all directions and as to all subjects and branches of the law. One thing follows as inevitable—if the courts are not bound by the plain provisions and the prior constructions of Chapter 49, they are not bound by any of the other statutes and their prior constructions put in force in Indian Territory at the same time, or any other time, and this whole legislation of Congress would thus be rendered absolutely futile. It is also sug-

gested that the Legislature of Arkansas did not have in mind the conditions of these Indians at the time it enacted Chapter 49. Suppose we grant that. Would it then necessarily follow that Congress was also ignorant of such conditions when it placed this statute in force in said Territory a half dozen or more times, and repeatedly made it applicable to such conditions?

We are all bound by the presumption that Congress knew its business, whether it did or not, and also bound by the laws it saw proper to put in force in said Territory, either by adoption or entire enactment. In further answer to this, might we not also ask: Was it ever supposed that our forefathers, in declaring the Declaration of Independence, or framing the Constitution of the United States, had in mind the elasticity and expansibility of the same to principles suited to modern conditions and for all time to come—things then never even dreamed of or known to the human race? Still, the courts of the land, including even the Supreme Court of the United States, go on acknowledging obedience to their mandates, and continuously holding and deciding they are irrevocably bound by their principles, provisions and conditions, expressed and implied, notwithstanding such forefathers "builded better than they knew."

It is also said on pages 534, 535 of the opinion:

> "But when the time came to disband the tribe (some superior power here recognized),

its ownership as a political society (which was simply that of occupancy under the patent and treaty of 1866) could no longer continue (why not if the *tribe* was doing everything then being done?), and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme, it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment."

In the first place, where are "the tenants in common?" Here, again, is a condition in law supposed, which in fact never existed among the members of these tribes, for the reason, so often stated, that they had no individual interest in the lands, and having no interest therein, surely they could not be "tenants in common." And if not "tenants in common," what tenure or estate in the lands did they hold? Nothing but the right of occupancy, before these allotments. But how about their rights and interests *after* allotments? No one will now be found whose opinion would be worth considering for a moment, who would say they do not now own the right to occupy their allotments, and also the fee thereof. Then as the allottee never owned his allotment before, or any interest in the lands of his nation, where did he get these "new rights," if he did not get them through these allotments which were accomplished by the Acts of Congress alone? The question answers for itself. But suppose it was

"more nearly akin to the partition of property among tenants in common?" Does that prove that it *was* a partition among tenants in common? A joint tenancy may be more like a coparcenary, or tenancy in common, than to a fee simple estate to a single individual; but still, that would not establish in law that the one was the other.

This decision further observes: "The right to the property antedates the allotment, and is simply given effect to by that act." What act are they talking about? It must have been the Act of Congress by which these allotments were made. *But*, if so, this was the "act" of "sovereign owner," and by and through whose benevolent kindness all "new right of acquisition" cometh. Then, it was surely "something new under the sun," at least so far as the allottee was concerned, for he never had it before, and was never entitled to it, according to the decisions of this court, but got it "by that act."

Then, again, it goes on to say: "Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe." As before said, that land never belonged to Andrew J. Berryhill at all, for he was born and died before any such law came into existence out of which that estate arose by reason of its own express provisions, and not at all by reason of any rights or merits of Andrew J. Berryhill. That estate arose and passed

directly from the government and this tribe under their patents, long *after* his death and he had no more to do with the lands, or rights therein, than any other Indian. It also observes: "*It was his birthright.*" How could that possibly be, when he died before the "birthright" got into existence? Can a person take a birthright *after death* which never *existed before?* We "reckon not." Nor is it correct to say that an allottee "acquires his right to the land," "by his membership in the tribe;" for there were hundreds of these Indians who were really members of some tribe in said Territory, who never got any allotment, nor could they possibly have obtained an allotment simply by "his membership in the tribe." For he was required under the laws of Congress *not* only to be a *member of the tribe*, but he must be *enrolled* by the Dawes Commission, in the way and manner provided by law, and then he was more or less under the control and direction of that Commission, before he got his allotment, *Wallace* v. *Adams*, 143 Fed. 716, which is a very able opinion delivered by Judge SANBORN, and in which the rights of allottees and the powers of said Commission are in a large measure defined.

Again it goes on to say: "It (the land) came to him by the blood of his tribal parent, and not by purchase." "His father was the only parent through which he derived his right, and to the father the land should pass."

Can it possibly be true that this allottee obtained his allotment "by the blood of his tribal parents"? No, he did not get it that way, at all. He got it by reason of the Original and Supplemental Creek Treaties enacted by the Congress of the United States, by whose express provisions each member duly enrolled, whether an Indian or not, was thus, and thus only, given a separate estate which not only embraced a right of occupancy in severalty, but likewise the fee simple title thereto; and in order for the rights therein provided for to become consummate and vest in the allottee, he not only had to be determined by said Commission to be a member of such tribe, but he then had to be so enrolled by said commission, and when he made his selection of the lands he desired, not exceeding 160 acres, a certificate thereof was given him by said commission, and then a patent therefor was given by the Chief and the Secretary of the Interior, after such Secretary had first approved such enrollment, as is expressly so provided in Section 23 of this Original Creek Agreement, approved by Congress on the 1st of March, 1901. So it took something more than "the blood of his tribal parent" to obtain an allotment. But has this "blood" theory anything whatever to do with those members getting their allotments? Let us see about that, also. If it be true that the allottee got his allotment by reason of "the blood of his tribal parent," as presented in this decision, then it cannot be denied that

he did *not* get it in *any other way*. So we have the thing down to a very fine point to start with. The maxim of law, *nemo est haeres viventis* (no man has heirs while he is living), has stood the test in the English courts for hundreds of years and no one was ever even presumed to doubt its accuracy, or to suppose that it was possible for a person to have heirs before his death. But here comes this "blood" theory, which, if it is to be followed, obliterates the old maxim and lays down a new rule of descent for the members of the Five Civilized Tribes; for, if the son gets his own allotment simply because he is "the blood of his tribal parent," or parents, no matter which, he does not get it in his own right at all, but simply because he is of "the blood of his tribal parent." It must be that way, for it is axiomatic that if he gets it by reason of being of "the blood of his tribal parent," then he gets it in no other way. If such allotment is to be held to be *ancestral*, then it must have come through or by reason of the parent, or parents, no matter whether *living or dead*, and thereby the son takes an estate by inheritance through the parents while they are still alive. Blackstone tells us this cannot take place, but here we have it on this "blood" theory.

Again, this notion is based on the inevitable condition that, as the son gets his allotment only through the blood of his parents, and not in his own right, then the allotment must have at one time be-

longed to that parent through whom the title thereto was thus derived, or, at the least, it must be that the parent had a right (not *some* right) to the lands. But under these decisions, we find that these parents did not have any more right to the lands than did their children, for none of them had any such rights, but the title vested in the son as well as in the father under the express provisions of these Acts of Congress. So here is the end of the notion that the son gets his allotment through his parent. That the children got allotments the same as the parents, we presume will not be denied, and that they got them under exactly the same laws and conditions, and subject to the same restrictions and control of Congress, we suppose will also not be denied, but readily admitted. If that be true then it follows as an inevitable conclusion not even capable of contradiction that the son's estate is absolutely independent of that of the parent or the parent's estate, and no more connection between them than there is between the allotments to the negroes and those to the Indians or white people who became members of such tribes. In other words, each and every member of each and every tribe who received an allotment, received that allotment by reason of his own right and individuality, and not because of the right or individuality of his parents. He got his allotment in every instance because under the *law* —not *parents*—he was entitled to it in his own individual right, and where he was not so entitled, he

did not get an allotment, no matter about "the blood of his tribal parents." If all an Indian had to look to was simply that he was of "the blood of his tribal parent," then he was immune from all danger of being deprived of an allotment; but we know as an historical fact that many of them did not get allotments because they were not on the rolls. Then something more than "blood of the tribal parent" was required, and being so required, shows there was nothing in this notion of "blood of the parent" in the original allotment, but, on the contrary, that there is nothing whatever in such a notion.

Again, if the allottee got his allotment "by the blood of his tribal parent," as so proclaimed in this decision, how did the allottee who had no "tribal parent" get his allotment? It is a matter of common information that hundreds of white men and women who had no Indian blood whatever in their veins, received allotments in these tribes. Here, if that theory is to be the rule, is a class of members who received their allotments in spite of the rule. And, again, if their allotments are to go according to the blood of the "tribal parent," and there was no such parent, as there would not be in case of these white citizens, what would become of their estates? Now observe that the estate, according to this theory, must stay in the blood of the tribe of which the allottee was a member before his death, and, of course, could not descend to any one who was not related by blood to that allottee. But it

could easily happen that such a member might not have a relative of the blood of that tribe, but would have children by another husband or wife not a member of that or any other tribe, or a father, mother, brother or sister, none of whom were members of that tribe of which he himself was a member, and because of which membership he got the allotment. Here we come to the parting of the ways right at the threshold of this "blood" theory, and we have a case in which it will not apply at all.

Again, suppose we take an Indian whose parents and relatives are all dead, of which there are many, many examples to be found among the members of these tribes, what would become of his estate? Here we are at the parting of the ways again. Suppose that same Indian had married out of his tribe and had children; here, under the laws of said Territory, those children would be members of their mother's tribe, if she was an Indian herself, and if not, the children were enrolled promiscuously; again, what would become of his estate then? It won't do to say it would go to his children under this theory, for the heir must be of his tribe, and his blood relative of that tribe. Here, again, we have arrived at the same place. Suppose, again, that we take a Creek Indian who first married a Creek woman, by whom he has children; then she dies, and he marries a Seminole woman and has children, and he dies, leaving his allotment which, of course, he received out of the Creek Nation. What would be-

come of that estate? Here, according to the tribal blood theory, the lands would go exclusively to his first set of children, to the entire exclusion of the second set. But where is there any such a provision for such a condition in Chapter 49 of Arkansas? It is not in there, but it does say the children shall inherit "equally," and that half bloods shall inherit equally with full bloods. True, Section 6 of this Supplemental Creek Treaty provided for such a condition, but we are now discussing a general theory of descent laid down in that case, and on which it was decided. Again, suppose a Creek child whose mother was a Creek and father some other stock, no matter whether Indian or not, had an estate. Its mother died before it, leaving no relatives except her child, then the child should die, who would get its estate, according to this theory? Thus there would be no person of the tribal blood of the mother from whom the child got its inheritable blood, and therefore, no one to take the estate, even though its father, and perhaps half brothers, uncles and aunts, grandfathers and grandmothers on the father's side might be living, and could take and would be entitled to the estate under Chapter 49 of Arkansas. Suppose that same child had a great grandfather on its mother's side; here, on such theory, that great grandfather would take to the entire exclusion of its own father and half brothers and sisters on the father's side. But, there is no such a provision in Chapter 49. Again, if the allottee got his allotment by reason

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of his tribal blood, which must mean *Indian* blood, where did the negroes get their allotments? It won't do to say they did not get them, for we know they did, and got allotments in every one of the Five Civilized Tribes. Again, on his death, what becomes of his allotment under this theory? Observe, you must follow along after that "tribal blood;" but the negro is not an Indian by blood. So there you have it again. Not a negro allottee in the whole five tribes would have an heir to his allotment, for the heir must be of the tribal blood, and there is no tribal blood in a negro. So about half of the Creek Nation and Seminole Nation, and vast portions of the other tribes, would thus escheat to the State of Oklahoma or the federal government where death took place before statehood. This is the last provision provided for in Chapter 49, but under this theory, it would be the *first* result in nearly every example we have given above. It is not to be presumed that Congress ever intended to put in force in said Territory a system of laws which could result in such huge graft as this in favor of the state it was creating, to the eternal detriment of its wards for which it had provided in the first instance by way of allotments. Here, it would seem, instead of the heir being protected under the known provisions of Chapter 49, and given the full benefits and fee of such estates, he is absolutely deprived of such estate under a rule of construction which never before existed, or was ever applied to the admitted

law of descent, by which the estate is governed absolutely, and, in so doing, the express provisions of that statute and the settled, established rules of construction thereof and a binding recognized rule of such construction, have all been ignored for this theory about the tribal blood, absolutely unknown and unprovided for in that chapter. Will such rule be followed by independent courts?

Nor is this the only evil that must necessarily come out of such a construction of that statute; for, if we are confined to the tribal blood of the intestate, and each original allotment is stamped as ancestral in the hands of the original allottee, then it inevitably follows that every such allotment in the Five Civilized Tribes is grooved into an ancestral estate, no matter whether that allottee is dead or alive; and if he dies intestate it must descend as ancestral to follow the rule of its origin, independently of Chapter 49; and following such rule it must necessarily divide the whole population of said tribes and the other people in that part of the state, *first*, into tribal members, and non-tribal members, for only tribal members of the tribal blood of the intestate can take the estate; *second*, the tribal members would, of course, be divided into degrees of relationship, some nearer than others to the intestate, for the protection of whose estates and the relative size or portion thereof, this rule makes no provision, and which condition would necessarily call for other new and untried rules; *third*, as to the whole

population we would have many relatives of the closest relation to the intestate postponed absolutely to some remote relative, and the estate which, under the constructions of said chapter by the Supreme Court of Arkansas, would go to the nearest relative, taken away from him by this rule and given to this remote relative without changing the laws of descent by legislative enactments; *fourth*, by such a rule applied to such a condition, we would have the *new acquisition* feature of Section 2531 of said Chapter 49 absolutely repealed by a judicial decision as to such estates and original allotments.

For, it is perfectly apparent that if the heir must be of the blood of the intestate and at the same time be a member of the tribe of the intestate, this will often result in separating the parents from their children, as where the parents are adopted into the tribe, or likewise the children so adopted and not the parents; and where only one parent is adopted and that be the father, his children can not inherit from him, for they would not belong to his tribe and therefore fall without the rule; and the father having no relative of the tribe his estate would escheat for want of a legal heir, yet he has children who under Chapter 49 would have taken the estate, regardless of whether it was ancestral or a new acquisition. Again, we are in trouble not only with those adopted by the tribes but likewise with the whole negro population who got their rights to this property, not by adoption, but by reason of these

treaties of 1865, 1866, etc., thus practically forced upon the tribes and whose rights in said lands are traceable directly to such treaties and not to the tribes at all; in which case none of them, literally speaking, would be of the blood of the tribe; and if not, then they likewise would be cut out by this rule of descent. And, too, parents would be deprived of inheriting from their children any of such estates for this rule takes the whole estate in fee simple or nothing at all.

In short, if only blood relatives who belong to the tribe of the intestate, can inherit the intestate's estate, then, it must inevitably follow that non-tribal citizens can not so inherit, no matter how closely they may be related to the intestate. This proposition can not be disputed; because the one condition absolutely prohibits the other. But there is no such provision in Chapter 49 of the Statutes of Arkansas; nor does that chapter permit any such a condition to arise, under any circumstances whatever; for in every instance in which a child dies, leaving an estate, whether ancestral, or a new acquisition, Chapter 49 makes a disposition of the estate according to its own provisions. If it be ancestral and came by the parents, it goes back to them in fee; if from one, it goes to that one in fee; but if a new acquisition, it goes to them in succession for life, then to collateral kindred according to degree of relationship. But here, if it must always go to the relation of the tribal blood, the parents may be forbidden

and denied any estate whatever, for they are not always of the tribe of the child, and *often one* parent is not of its tribe. The same might be said of the inability of children to inherit the estate of the parents, or one of the parents.

It won't do to say: We will apply the rule as far as it works to suit the theory, then resort to the old constructions placed on Chapter 49; for the system must be perfect within itself and meet every kind of an estate. It is too evident to need argument that if the rule cannot be made to stand up of its own force, and in every instance and make the laws of descent harmonious and effective, it will not stand the test in any *single* instance; and should be at once rejected as unsound; for laws are not accepted by installments or as applicable to one estate and not to another of the same general character. A general law of descent is applied alike to *all* estates, regardless of whether the intestate was white, black or an Indian, an Arab, Frenchman or an Englishman; nor does the same relate to rank, cast or condition of that intestate or his heirs. But it is a uniform system effecting all estates within the jurisdiction of the state alike; and discriminates against none, in favor of others, because of their race, color or condition of life. We take this to be so self-evident and rudimentary that no one will presume to deny it.

If the legislature should pass a law of descent for the white population of this state, another of a

different character for Indians, still another for negroes, and so on for each nationality within our borders, we presume that no one would suppose such statutes would stand the test under the provisions of the Constitution of the state and of the United States. Then, why should a judicial decision bringing about practically the same conditions, and the same inequality and discrimination, be followed or established, under a single law of descent which from the time of its origin has been given an entirely different construction?

We do not mean to be disrespectful to the Circuit Court of Appeals or to its decision rendered in the case of *Shulthis* v. *McDougal;* but do believe the whole premises on which that decision was founded were erroneous, and that the conclusion reached in that case was as erroneous as the premises. And we firmly believe that such a decision if followed and put fully into force in this state will end in endless litigation for years to come and result in the subversion of the true intention of Congress to abide strictly by Chapter 49 of the Statutes of Arkansas and its prior constructions so long and frequently adhered to by the Supreme Court of that state.

The true meaning of that statute is as definite and certain under such rules and constructions as is possible for the rules under any law of descent to be; and undoubtedly Congress had that fact in mind when it kept continuously putting that chapter

back in force in Indian Territory; and it is our humble judgment that it is far better that the courts in settling estates which are governed by that statute, abide by the settled and established rules and constructions thereof which amply provide for all manner of estates which can possibly arise under it, and by which the rights of each heir thereunder can be easily determined by such settled and established rules, than to attempt to lay down or follow some new theory confessedly based upon an entirely new notion which also in turn is openly against such established precedents and established rules by refusing to recognize the estate being passed as either one of purchase or descent, but of some new specie heretofore unknown to said chapter or the courts which have dealt with and construed it from its origin.

We also believe that "it is better to bear the ills we have than to fly to those we know not of," as would surely result if this *Shulthis* decision is to be recognized as the law of descent in estates arising under Chapter 49 of the Statutes of Arkansas. We gave but a few illustrations of such inequalities, distinctions and fatal results, which would follow such a rule as laid down in that case; but they are enough to show what can arise, which of itself is enough, even if there were none others.

This descision attempts to stamp forever every allotment in the Five Civilized Tribes in the hands of the original allottee as an ancestral estate, *not*

because it ever belonged to an ancestor, because they say it did not; *not* that it descended from an ancestor for they tell us plainly that it "did not come to a member of the tribe by inheritance from any ancestor;" *not* that it came by *gift* or *devise* from an ancestor, which, under Chapter 49 of Arkansas are the only three ways in which an ancestral estate can possibly arise under any circumstances known to the law of that chapter; *but simply* because the allottee procured his allotment "*by the blood of his tribal parent.*" Is it not as plain as the sun in heaven that in *all* such matters the *rights* of the *child* were equal and the *same* as this much-thought-of *parent*, and governed by the *same laws;* and measured in and by the same standard and guaged by the same rules in one, in all, and in *every* particular as those of this *parent;* that their rights were equal and the *same* in quality, quantity, and character *always;* and the estate of the one arose under the same laws and absolutely *independent* of the other —with *no connection* between them in any sense *whatever?* Then how is it possible for one estate to depend upon or in any sense of the word arise from, the other or the other's owner, whether that owner be father or son? Absolutely, it is too plain to need illustration that the child in each and *every* instance got his allotment in his *own* right and *not* "by the blood of his tribal parent," or on account of the *blood* of *any* person, his own included. He got his allotment because he was a member of the

tribes and had been duly enrolled as such by the Dawes Commission and approved by the Secretary of the Interior, no matter whether he was child or parent, son, daughter, father or mother, an Indian or negro, or adopted white person by marriage or otherwise. All who got allotments got them just that way, and in no other way. Each member so enrolled upon the roll books formed a single unit of the Creek membership among whom the lands were to be allotted by the United States, giving each unit 160 acres; and each member got that land because he or she was one of those units; and not because of the *blood* which coursed through his vien. In all such matters, the child was as important as the parent to the government whose bounty was thus being distributed. They were both its wards; and each under exactly the same care and protection, and their rights were equal in all respects but absolutely independent of each other, as much so as if no relation whatever. Then, how by any course of reason based upon the truth and actual facts which enter into the matters, can any one contend or maintain that such original allotments were ancestral, and made such only *by the blood of the tribal parent?* It won't do to undertake to maintain that these allotments were, in the hands of the original allottees, *ancestral* estates, and on the death of such allottee, intestate and without issue, descended as such *ancestral* estates, and at the same time openly confess that such allotment did *not*

come to such intestate from an *ancestor* at all, by descent, devise or gift as it must do under Chapter 49, in order to *be ancestral*. Chapter 49 of Arkansas is the law which governs; and characterizes *all* estates arising under it, either as *ancestral*, or a *new acquisition*. The estate has to be one or the other. It cannot be *both;* nor can it partake of the distinct, or partial, elements of both at the same time, as to the same heirs. And, in order to be *ancestral*, as therein provided, that estate is bound to have first come from some *ancestor;* and it must have come by *descent*, *devise* or *gift* from that *ancestor*, just as provided in that chapter. This also is self-evident, under the express provisions of said chapter itself. Then, if that chapter is the law governing the disposition of such estates, the courts are *bound* by said chapter, and that chapter alone, and have no power to go off after strange notions about what the law is, or ought to be. And if it be admitted that such estates are not derived from some preceding *ancestor*, as was openly done in this *Shulthis* case, then it follows as an inevitable conclusion and result that such estates are simply *bound* to be *new acquisitions*, under the very provisions of said chapter which alone is the law of the case. It would be a *legal impossibility* to be *otherwise;* for it *must* fall in one class or the other, and when it is admitted that it did *not* come from an *ancestor*, that of itself indisputably admits that it is a *new acquisition*, for these are the only two classes provided

for in said chapter. After admitting there *was* no ancestor, which is the absolutely indispensable element of an *ancestral* estate, the simple declaration or finding that the estate *is* ancestral *anyway*, amounts to *nothing at all*, for the character of such estates are fixed by the *facts in the case*—not by the courts. And the attempt of a court to make an estate ancestral, without an *ancestor*, is, as said by Justice Holmes, in *Fleming* v. *McCurtain*, simply *arbitrary;* and can not thereby create a *new specie* of *ancestral* estates, unknown to, and unprovided for, in said chapter, whereby the will of Congress is defeated and the provisions and established construction of said chapter are supplanted by this new construction.

But suppose we now take another view of the meaning of this *Shulthis* decision, and conclude that it was not therein intended by the words "by the blood of his tribal parent," and other expressions of like import, that the heir must be a member of the tribe of his parent at all; but might be a member of any other tribe or no tribe at all. Then, what happens? Now, mark you, that this whole decision is based on the theory that the *tribe* was the factor that was doing everything and that it owned the very property itself; and that each and every allottee got his allotment "*by the blood of his tribal parent*, and *not* by *purchase*." And that *tribal theory* is made the *substitute* for the real *ancestor* provided for in Chapter 49 of Arkansas; and *be-*

cause of that fact, they must proceed by "*analogy*," and the "*analogy*" became, in turn, the *father* of this new specie of a *new* ancestral estate, openly admitted not to have been known to or under Chapter 49. Now by accepting an heir outside of the *tribe* of the intestate, we thereby destroy this *tribal theory;* for we thereby destroy that tribal "substitute" of an actual *ancestor* required under said chapter, and the destruction of that "Substitute," of itself destroys that "*analogy*," which, in its destruction, annihilates this *new ancestral estate* thus created by the tribal theory based on that "substitute" for the actual ancestor. This, like the negro's theology, destroys the whole theory, simply by asking too many questions. With the *theory* destroyed, of course, the decision based on it, must likewise fall with it; and with it must fall this notion of this new specie of an *ancestral* estate; and with the total absence of an actual *ancestor* required in said chapter, openly admitted in the decision itself, it follows as inevitable that such estates must fall in the other classification made in said chapter which was that of a *new acquisition*, where such estates belonged in the first instance, according to that chapter and all its previous constructions.

Not only this; but the notion of giving an estate thus stamped as an ancestral estate because of this tribal blood, to an "heir," not of that *blood*, is openly contradictory of the whole law of descent as to *ancestral estates*, as far back as the days of

Feudalism. For both at *common* law and said Chapter 49 of Arkansas, the heir to an *ancestral* estate *must* be of the blood of that *ancestor;* but here the tribe or tribal relation is made the "substitute" for such actual ancestor, and then an "heir" is let in to take the estate, by such theory pronounced *ancestral*, who, in fact so admitted, is not a member of that tribe or of that tribal blood even, such an inheritance is openly in conflict and violation of the whole known and admitted law of inheritance which has governed such ancestral estates from the earliest times; for, as we have just said, *that* heir *must* be of the blood of that ancestor from whom the estate was derived. Then, it follows as an inevitable conclusion again, that such a theory must fall, or such outside heirs can not take such an estate by inheritance under the theory. Then, we are back again to where we arrived on the view first taken, namely, that such a theory would result, in many instances, in depriving children from inheriting the estates of their own parents, and that of the parents inheriting the estates of their children; but such estates would go either to remote relatives of the tribe of the intestate to their entire exclusion; or escheat to the state because such tribal blood relatives were wanting.

If on the other hand such an outside heir *can* inherit such an estate, then, again, it follows as another inevitable conclusion and result, that such an estate is not *ancestral* at all; for no one but the an-

cestor, if living, or if not his own blood heir, could ever take an ancestral estate by inheritance.

Consequently, such an estate falls squarely within the class of a *new acquisition* again, where, in fact, it properly belongs.

We might go on and on applying these illustrations, pointing out examples of hardships arising under such a theory of that case, and multiply the inherent defects of such a system other than what is already given; but it would serve no useful purpose to extend these matters, for we are of the belief that what is already said is sufficient to show that the theory and the premises on which it is predicated, are clearly erroneous and totally at variance with Chapter 49 of Arkansas by which alone, and its prior constructions, all courts are bound in passing on estates which fall under its provisions.

In Vol. 26, page 174, of the Am. and Eng. Ency. of Law, it is observed:

> "In case of a conflict between the decisions of the federal Circuit Court of Appeals and a state Supreme Court, a state court of the first instance will follow the decisions of the state Supreme Court. Nor is the construction placed by the United States Circuit Court upon a federal statute binding upon the state Supreme Court. While its decisions will be respectfully considered, an examination of their soundness is not precluded."

In *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 492, 45 L. ed. 1200, it was held by the Supreme Court of the United States that:

> "Federal statutes must be interpreted by the federal courts independently of local considerations, and cannot be said to have an established meaning, whatever the decisions of other courts may have been, until they are *construed by the Supreme Court of the United States.*"

This court, therefore, is left to decide this case absolutely independent of this *Shulthis* decision; and in so doing the court will observe that, according to the last decision of the Supreme Court of the United States, the Circuit Court of Appeals should have decided that case "*independently of local conconsiderations;*" but it did not do so, for it was the *local considerations* therein referred to, which brought about the decision itself—not the 49th Chapter of the Statutes of Arkansas or its former constructions by the Supreme Court of that state, which the court therein refused to follow, but originated an entirely new theory of its own simply because of those "local considerations."

So this last decision of the Supreme Court of the United States, above cited, serves two purposes in the case at bar, namely, *first*, that only decisions of the Supreme Court of the United States in the construction of federal statutes, are binding on all other courts; *second*, that in construing such federal

statutes, courts must not take into consideration "*local considerations.*"

So, as we have said in a former part of this brief, these statutes thus adopted must be construed independently of such conditions; and the conditions must bend to the law itself. And, according to the numerous decisions we have cited from the Supreme Court of Arkansas, this court, and that of the Circuit Court of Appeals itself, we must take the law as it came to us, on such adoption from the State of Arkansas, from the hands of the judiciary of that state, and as so construed by the Supreme Court of that state. This court has thus time and again declared that such constructions of adopted statutes were binding on it; and as it is the court of last resort on the construction and application of our adopted statutes, we respectfully submit that such rule should be followed by all other courts in passing upon such statutes.

And if such constructions and interpretations thus given this Chapter 49 of the Statutes of Arkansas by the Supreme Court of that state, prior to such adoption by Congress, are followed, we contend that it will result in determining that each and every allotment in the Five Civilized Tribes came to the original allottee as a new acquisition, and *not* as an ancestral estate; and upon the death of such allottee, intestate and without issue, that estate passes to his heirs as a new acquisition under the provisions of Section 2531 of said chapter.

Third Assignment of Error.

That said court erred in holding and deciding that Section 6 of the Supplemental Creek Agreement, approved June 30, 1902, was in force and effect at the time the descent was cast in this case, to-wit, November 3, 1907, and the terms thereof controlled in the devolution of said estate.

Section 6 of the Creek Supplemental Agreement never had any application to actual allotments, but related to the public lands of said Creek Nation.

This section has been construed by the federal District Court for the Eastern District of Oklahoma, in the case of *Armstrong* v. *Wood*, 195 Fed. 137, wherein it was held that said section had no application to the lands of the Creek Nation, which had actually been allotted to such Creek members; but that said section related only to the unallotted lands of said Creek Nation.

In this decision, this learned court is sustained by the very language of the provisos thus found in this section. This section is as follows:

> "*Repeal—Arkansas Law Effective—Non-Citizens Excluded, When.* 6. The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the

Statutes of Arkansas, now in force in Indian Territory; *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation; And, *provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs, in the order named in said Chapter 49."

This Supplemental Creek Agreement became effectual as a law on the 8th of August, 1902; but prior to that time, and on the 27th of May, 1902, these Creek laws of descent and distribution had been expressly repealed by an Act of Congress, wherein it provided:

"*And provided further*, That the act entitled 'An Act to Ratify and Confirm an Agreement With the Muskogee or Creek Tribe of Indians, and for Other Purposes,' approved March first, nineteen hundred and one, in so far as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed and the descent and distribution of lands and moneys provided for in said act shall be in accordance with the provisions of Chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory."

This act, however, was, by a joint resolution of both houses of Congress, suspended until the first day of July, 1902, at which time Chapter 49 of Arkansas, thereunder became the law of descent governing the descent of lands provided for in this

Original Creek Agreement; and the same was in force, and this Supplemental Agreement took effect on August 8, 1902.

In said Section 6 these Creek laws of descent and distribution are again attempted to be repealed, and Chapter 49 of Mansfield's Digest of the Statutes of Arkansas were again put in force in the Creek Nation, with these above named provisos. The first proviso is "that only citizens of the Creek Nation, male and female, and their Creek descendants shall *inherit lands of the Creek Nation.*" The significant inquiry then arises: What was meant by "lands of the Creek Nation"? Both provisos relate only to such lands. Under the original grant to said nation of August 11, 1852, the lands embraced within said grant were conveyed to the Creek Nation, on the conditions hereinbefore referred to; and it held those lands under those conditions until the passage of the Original and Supplemental Creek Agreements, when portions thereof were allotted to the members of said tribe. But it is a fact of which this court can take judicial knowledge that large portions of said lands have never been allotted to anyone, but have been directed by Acts of Congress to be sold.

In section 27 of said Act of Congress of April 26, 1906, it is provided:

> "*Tribal Lands to Be Held in Trust by United States.* SEC. 27. That the lands be-

longing to the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs, as the same shall appear by the rolls as finally concluded, as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress."

By this section it is apparent that it related to the surplus lands of said respective tribes, which remained, or would remain, after the lands of these tribes had been duly allotted to their respective members, as provided in the treaties with these tribes providing for the allotment of the lands. After the allotments were thus made, the titles thereto passed to their respective members to whom the particular allotment was thus made; and it was not in the power of Congress to divest the title thereto of such allottee, *Jones* v. *Meehan*, 175 U. S. 1; *Choate* v. *Trapp*, 224 U. S. 665, 56 L. ed. 941. Nor did the members of these respective tribes, under said section or their respective treaty, acquire a vested right in the surplus lands of these tribes; and it was not unconstitutional for Congress to open the rolls of these respective tribes and admit other members, and provide for them out of this surplus, *Gritts* v. *Fisher*,

224 U. S. 640, 56 L. ed. 928. So that the words "*lands of the Creek Nation*" used in the first proviso in said Section 6 of said Creek Supplement, must have had reference to the surplus land of the said Creek Nation; for, in fact, these are the only lands that could be included in the plain language of this proviso, as was so held in *Armstrong* v. *Wood*, *supra*. The lands of said Creek Nation, which had been or should thereafter be, allotted to the members of said Creek tribe, could not consistently be spoken of as lands of said Creek Nation, for they belonged to these respective allottees in fee simple. If this be true, as so held in that case, then it is perfectly clear and undeniable that these provisos had no reference to an actual allotment. The lands in controversy in the case at bar, had been allotted to Waitie Washington, under the terms and provisions of this Original Creek Agreement, during his lifetime, and he died seized and possessed of the same. It, therefore, would follow that said allotment of said deceased son would, on his death on the 2nd or 3rd of November, 1907, descend to his heirs strictly in accordance with Chapter 49, which was thus put in force in the Creek Nation by said Section 6 and said Act of Congress of May 27, 1902, and throughout the Indian Territory by the Acts of May 2, 1890, and April 28, 1904, as so charged in the answer of the plaintiff in error. Section 27 of this Act of April 26, 1906, is clearly indicative that said allotments were not ancestral; for it is held by this

court in *Gritts* v. *Fisher*, that such members of said tribe had no vested interest even in the surplus lands of these tribes, even after the enactment of these recent treaties, whereby such members were vested with the fee simple title to their respective allotments; for had such surplus of the lands of said tribes either been ancestral or held in trust by said tribes or by the United States, as trust estates for the use and benefit of the members of such tribes, then such members would have had a vested beneficial interest therein of which they could not have been deprived by any Act of Congress, as indicated in the decisions above cited and which fact is referred to in *Gritts* v. *Fisher*.

This again would leave these allotments when so made as new acquisitions; and under Chapter 49 of Arkansas, they would be governed by Section 2531 thereof, under which the lands in controversy would go to the plaintiff in error for life, with the remainder to the collateral kindred of Waitie Washington, as therein provided. Section 6 of said Creek Supplement, taken with its provisos, is not inconsistent with a life estate of the plaintiff in error in the lands in controversy.

Even if it should be held that the words "lands of the Creek Nation" referred to and embraced allotments which were made in the lifetime of the allottee, still be respectfully submit that these provisos do not deprive the plaintiff in error of a life estate in the said lands.

It was held in *Lamb* v. *Baker*, and *Hughes Land Co.* v. *Bailey*, above cited, that Seminole citizens could inherit the allotments of Creek relatives. This was put upon the ground that such Seminoles were part Creeks, and that this provision included them under the phrase "Creek descendants," provided for in this section. This firmly establishes, according to these decisions, that a Seminole who possesses any Creek blood whatever can inherit from a Creek his own allotment, provided he would have taken the allotment under said section had he been a full-blood Creek. It would seem at first blush that a "Creek descendant" would have to be a Creek of the full-blood, for, if not full-blood, he would be only part Creek and part something else. But the state Supreme Court has held otherwise in these two cases, and it is done on the broad ground that it was never the intention of Congress to deprive near relatives of their right to inherit from their ancestors, which is the natural law of descent, and should always be observed unless the law clearly indicates otherwise.

But Section 6 disposes simply of the "*lands*," and provides that "only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation," but "if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs, in the order named in said Chapter 49." Here we submit that

a life estate is no part of the "lands"; for it vested the life-tenant with only the use, issues and profits of said lands during his lifetime, with the fee thereto vested in some other individual, in whom it had been vested all the time during the life of the life-tenant, and at his death this remainder man, having had the fee simple title all the time, would come into the possession thereof also. The court will bear in mind that it was Chapter 49 of Arkansas that furnished the rule of descent in this case, no matter whether under this Creek Supplement or the Act of Congress of April 28, 1904; and Chapter 49 provides for a life estate to both father and mother, where the child dies, without issue or descendant, seized and possessed of a new acquisition. We, therefore, submit that it would not be a strained or inconsistent construction of said Section 6 of said Creek Supplement to hold that a non-Creek father or mother could take a life estate in a Creek allotment, with the fee simple title thereof vested in a Creek citizen. It cannot be denied that Chapter 49, *plus* these provisos, as provided for in said Section 6, is repugnant to, and inconsistent with Chapter 49 *minus* the provisos. Otherwise, the provisos would signify nothing whatever, and that Section 6 and Chapter 49 be repugnant and irreconcilible, if these provisos mean what is contended for by the defendant in error, and so held by said state courts. But we believe that in the construction of said section and chapter it is con-

sistent to hold that the father and mother have an estate for life in a Creek allotment, the same when they are Creek citizens as when they are not Creek citizens; for the word "lands" as used in this section has a strict legal definition and includes everything that inters into the composition of the earth, but it does not necessarily include the use and occupation thereof for a definite, or an indefinite, period of time, but which must end or terminate some time and leave the possession to pass into the hands of the owner of the fee.

As heretofore referred to, it is a rule of construction that the entire statute must be construed together, and if there are more than one statute or different statutes *pari materia*, they must be construed together; and if two statutes are inconsistent, but are susceptible of two constructions, one which gives effect to both statutes, and the other to only one of them, courts should adopt that construction which will leave both statutes, or parts thereof, in force and effect.

We, therefore, submit that, on legal principles, Section 6 of this Creek Supplement, can be consistently so construed as to give non-Creek fathers and mothers a life estate in the allotment of their Creek children, under the provisions of Chapter 49 of Arkansas; and that, therefore, the plaintiff in error, in any aspect of this case, had a life estate in the lands of his deceased child; and that the decisions of said state courts are erroneous and have

thus deprived the plaintiff in error of his interest in said lands, contrary to these respective Acts of Congress.

The state courts in effect held: That, on the death of Waitie Washington, the fee simple title to his said allotment descended exclusively to his mother, Sissie Cosar, through whose conveyance the defendant in error became the owner in fee simple of said lands. This, we respectfully submit, is contrary to all the decisions and authorities we have heretofore cited; and, to maintain these decisions of the state courts in the case at bar, the defendant in error is driven to rely practically alone on the case of *Shulthis* v. *McDougal*, 170 Fed. 529, and *Pigeon et al.* v. *Buck et al.*, 38 Okla. 101, 131 Pac. 1083, which latter decision simply follows the former decision and adopts it simply as a rule of property. If the case of *Shulthis* v. *McDougal* is not sound in principle, then it follows, of course, that *Pigeon* v. *Buck* is likewise erroneous and unfounded in principle; and if it stands at all it must do so simply on the ground that it has become a rule of property in the State of Oklahoma. We will consider these decisions in their order, and in doing so, we respectfully submit to this court that neither of said cases are predicated upon sound legal principles, and do not correctly construe the Acts of Congress and the Statutes of Arkansas, which were involved in those cases and in the case at bar.

Point 2 of the syllabus in *Shulthis* v. *McDougal* is as follows:

"2. INDIANS (Sec. 18*)—*Lands—Death Before Allotment—Descent—'New Acquisition'—From His Father.* The heirs who take under such provision and their estates are determined by Mansf. Dig. Ark. c. 49, which provides that, on the death of a person intestate, unmarried, and leaving no children, the estate, if it came from the father, shall go to the father, and if from the mother shall go to the mother, 'but if the estate be a new acquisition it shall ascend to the father for his lifetime and then descend in remainder to the collateral kindred of the intestate.' A child whose father was a member of the Creek tribe, but whose mother was not, was born May 6, 1901, and died in November of the same year. He thus became entitled to enrollment in the tribe, but had not received his allotment at the time of his death. *Held*, that, technically, the Arkansas statute did not apply to the situation, since the land to which the decedent was entitled and which was the common property of the tribe, did not, strictly speaking, come to him by grant, inheritance, or purchase, but by a division of lands held in effect by a tenancy in common to an interest in which he was born as a member of the tribe entitled to enrollment therein; but that, applying the statute by analogy, such land was not a 'new acquisition,' but came to him by the blood of his tribal parent, or, within the meaning of the statute, 'from his father,' and that, therefore, on his death and the subsequent allotment, his father took the full title, and not merely a life estate."

If we understand this correctly, that decision is predicated upon the following propositions: *First*, that such heirs are determined by Chapter 49 of Mansfield's Digest; *second*, that "technically, the Arkansas statute did not apply to the situation, since the land to which the decedent was entitled * * * did not, strictly speaking, come to him by grant, inheritance, or purchase;" *third*, that the land of the tribe "was a common property of the tribe," and was held by the members of said tribe "in effect by a tenancy in common;" *fourth*, that said land was not a "new acquisition," but that the same "came to him by the blood of his tribal parent, or, within the meaning of the statute, 'from his father';" *fifth*, that upon said allotment being made "the father took the full title, and not merely a life estate."

We agree that Chapter 49 of Arkansas determined the heirs; but we deny the other four propositions. As to the second proposition, namely, that the Arkansas statute did not apply to the situation, because the land did not come to him by grant, inheritance or by purchase, we refer to the decision in the case of *Mullen* v. *United States*, 224 U. S. 448, 56 L. ed. 834. In that case the lands involved arose under Section 22 of the Choctaw and Chickasaw Supplement, which, in effect, provides that where a member died before receiving his allotment, the lands should be allotted in his name by his administrator or the Commission, and should descend ac-

cording to Chapter 49 of Arkansas, which is practically the same in effect as Section 28 of the Original Creek Agreement, except as to the laws of descent, and Sections 7 and 8 of the Supplemental Creek Agreement, in which Chapter 49 was made the law of descent. After setting forth said Section 22 in this *Mullen* case, this court observed:

> "In the cases falling within this paragraph, there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it was the intention of Congress that a provision for such selection should be read into the paragraph, so as to assimilate it to paragraph 12, relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as such heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe; and where there were a number of heirs, each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute.

> In the agreement with the Creek Indians (Act of March 1, 1901, 31 Stat. L. 861, 870, chap. 676), it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled, if living, should descend to his heirs, 'and be allotted and distributed to them accordingly.' * * * It is true that under the Creek Agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw Agreement the allotment was to be made in the *name* of the deceased member, and 'descend to his heirs.' This however is a mere formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs," etc.

Here it is held that the fact, that under said Section 22 the lands were to be allotted in the name of the allottee, and under this Creek Agreement the lands were to be allotted in the name of the heirs, "is a mere formal distinction and implies no difference in substance;" that Chapter 49 of Arkansas determined the heirs; that said heirs might, or might not, be members of the tribe; and last that such lands "passed at once to the heirs," or "were to go immediately to the heirs," which thus passed said land to the heirs by purchase and not by descent. This is contrary to the second proposition thus laid down in the *Shulthis* case.

As to the third proposition, that the lands of the tribe "was the common property of the tribe, and was held by the members of said tribe in effect by a tenancy in common," we submit that said land of the tribe was not the common property of the tribe, as may be seen by the decisions of this court, wherein it was held that said members of said tribe had no several or individual interest in the lands of their respective tribes. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 39 L. ed. 120; *Stephens* v. *Cherokee Nation*, 174 U. S. 55, 43 L. ed. 1041; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 136, 48 L. ed. 651; *Cherokee Trust Fund*, 117 U. S. 288, 308, 29 L. ed. 880, 886; but such were public lands, *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 136; *Wallace* v. *Adams*, 143 Fed. ...., same 204 U. S. 415; *Ligon* v. *Johnson*, 164 Fed. 670; and were subject to the plenary powers of Congress, *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308, 47 L. ed. 183, 190; *United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532; *McKay* v. *Kalyton*, 204 U. S. 458, 51 L. ed. 566; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, and *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286, 55 L. ed. 748; and that the title to the tribes themselves was only a base or qualified fee, *United States* v. *Reese*, 5 Dill. 405, and *Fleming* v. *McCurtain*, 215 U. S. 438, 54 L. ed. 88, in which last case it is held that "the grant being to the nation only, is limited in point of time to the corporate ex-

istence of the nation;" and we also submit that the members of said tribes were not tenants in common of the lands of said respective tribes; and that the same was so held by this court in *Gritts* v. *Fisher*, 224 U. S. 640, 56 L. ed. 931, where this court observed:

> "Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible. And when children were born into the tribe they became thereby members, and entitled to all the rights incident to that relation. Under treaties with the United States the tribe maintained a government of its own, with legislative and other powers, but this was a temporary expedient, and in time proved inefficient and unsatisfactory. As in the instance of other tribal Indians, the members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds among them, and to terminate the tribal government. This Congress undertook to do. The undertaking was a large one and difficulties were encountered. The first legislation was largely preliminary and experimental and need not be especially noticed, because no material change in the situation resulted therefrom."

The cases of *Fleming* v. *McCurtain* and *Gritts* v. *Fisher* have been decided by this court since this decision of *Shulthis* v. *McDougal* by said Circuit Court of Appeals; and as shown on page 89 of 54 L. ed., this case of *Shulthis* v. *McDougal*, 170 Fed. 533, was cited as authority by counsel for plaintiffs in error to show these previous vested rights of the original Choctaw members and their descendants. But that decision was decided adversely to their contention, and no reference was made, or consideration given, to this *Shulthis* decision in the opinion of this court in that case.

That prior to these recent treaties the lands of these respective tribes were not held as a trust estate for the individual or separate use, benefit and interest in fee simple for such members, is further sustained by the fact that by said Section 27 of said Act of Congress of April 26, 1906, Congress made express provisions that such surplus lands should be so held for such members. This is practically a construction of these prior treaties of Congress by Congress itself; for if this surplus land was not stamped as a trust estate for such members prior to the Act of April 26, 1906, it is evident that the whole domain of such tribe was not so stamped under these original treaties by which these respective domains were set apart to these tribes. If such domains had been a trust estate in fee for these tribes in the beginning, it is evident that such surplus so remained after the allotments; and would remain

so without said Section 27. It, therefore, follows that the members of these tribes, prior to these recent treaties whereby said lands were allotted, had no several interest in said lands nor were they tenants in common, as was maintained in this *Shulthis* decision.

The fourth proposition is that said lands were not a new acquisition, but came to the allottee "by the blood of his tribal parent." After it is shown that these members had no interest whatever in the fee to these lands prior to allotments, and were not tenants in common thereof, it is difficult to see how such lands could be ancestral, or, by analogy, partake more of an ancestral estate than a new acquisition; or how the blood of the tribe could possibly have anything whatever to do with the character of the estate of an allotment made under and by reason of the express provisions of these treaties. That these members acquired the fee simple title to their allotments under these recent treaties when they so received them, and the right to such allotments before receiving them, but after the enactment of the treaties, will not be denied or controverted in the least. On page 534 (170 Fed.) it is observed:

> "The right to such a share is not created by the statutes, but is simply recognized and enforced by them. The several agreements and Acts of Congress are not concerned with the legal title, but go back to the actual beneficial rights of property as they had always existed in Indian Territory."

But this court, as above shown, held that such members had no individual rights in these lands and were not tenants in common prior to these recent treaties; and Sections 3 and 23 of this Original Creek Agreement specifically set forth by their express provisions that each member should have 160 acres of land to be assigned to him by the Commission as therein provided, whereupon the Principal Chief should execute deeds therefor, and the same had to be approved by the Secretary of the Interior, whereupon the right, title and interest of the government and the Creek Nation passed to the allottee, and he was thereby estopped by the terms of his deed, *United States* v. *Choctaw Nation*, 179 U. S. 496, 45 L. ed. 291. In the Creek Nation these allottees derived the fee simple title to their allotments under the Original and Supplemental Creek Treaties and subsequent Acts of Congress, and in the way and manner expressly provided in said acts. Such allotments came to them as a bounty of the government, *Fleming* v. *McCurtain;* and there was no consideration whatever for the allotment of these lands in fee, unless possibly the relinquishment by the members of the tribe of their right to simply the use and occupancy to these lands in common under the original grant, which gave them no fee whatever in the lands. But even if that relinquishment should be taken as the consideration for the allotment, such consideration did not come from the father or the mother any more than it came from the child; nor

was it given up by the child in right of the father or the mother; for, as shown in *Gritts* v. *Fisher*, each member, whether father, mother, or child, had the same right to use and occupy these lands, and that right came by simply being a member of the tribe; and that, too, regardless of whether the member was an Indian, freedman, or an adopted white person. So there can be nothing in this blood theory or ancestral estate by analogy.

The fifth proposition, that the father took the fee instead of a life estate because he was a member of the tribe and the mother was not, and that, if both father and mother were members of the tribe, such allotments would go to them, equally as an ancestral estate, we submit is contrary to the provisions of Chapter 49, *first*, because neither father nor mother ever had any interest in such allotments, either prior to such allotments or during the life of the allottee, for reasons hereinbefore shown; and, *second*, because Chapter 49 makes no provision whatever whereby an ancestral estate goes equally to the father and mother, as held in this *Shulihis* decision, unless in the case where the father and mother in equal proportion gave or devised an estate to a child, or where they left a joint estate, which passed to such child by descent. It is not contended in this *Shulthis* decision, nor could it be, that such lands came to the allottee from the parents by gift, descent or devise; or that such allotments ever

belonged to such parents, or that they had any individual interest in the same before the same was allotted to the child. In order to be ancestral, under Chapter 49, the intestate must have received the lands from an ancestor by gift, descent or devise, as therein and in the case of *Kelly's Heirs et al* v. *McGuire*, 15 Ark. 588, is plainly shown. An ancestral estate at common law was derived from an ancestor by descent, but Chapter 49 has enlarged this provision by including a devise and gift as well.

For these reasons, we believe that the case of *Shulthis* v. *McDougal* is not well founded, and that the position there taken is not at all tenable.

We will next consider the case of *Pigeon* v. *Buck:* This case is reported in 38 Okla. 101, 131 Pac. 1083, and relies absolutely upon *Shulthis* v. *McDougal et al.*, 170 Fed. 529, and stands by the same on the ground that the same has become a rule of property. After that decision that case was brought to this court by a writ of error, where it is now pending and undetermined, and which file number is 23754. This *Shulthis* decision was likewise brought to this court, but was dismissed by the court for want of jurisdiction, on the grounds that the petition of the plaintiff embraced no federal question other than a diversity of citizenship, as may be seen in its decision, reported in 56 L. ed. 1205, and thereafter. This left the decision of the Circuit Court of Appeals final in that case; but we

respectfully submit that said decision is not a final construction of Chapter 49 of Arkansas, as its finality depended alone upon the diversity of citizenship, and not a final construction of said chapter; that the construction of a federal statute by an intermediate federal court is not binding on this or state courts, according to decisions hereinbefore cited; nor can the decision of an intermediate federal court become a rule of property, as to a federal statute, as was so held in *The Madrid*, 40 Fed. 677, and *American Mortg. Co. of Scotland, Limited*, v. *Hopper et al.*, 64 Fed. 553, which cites the former case, and holds:

> "*Stare Decisis—Rule of Property.* Decisions of the Circuit Court of the United States, from which no appeals were taken, cannot be regarded as establishing a rule of property to which it is the duty of the Circuit Court of Appeals to adhere under the doctrine of *stare decisis.*"

It is true, that the *Shulthis* case was first tried in the Circuit Court of the United States, 162 Fed. 331, and be it held that such land was a new acquisition. It was then taken to the Circuit Court of Appeals, 170 Fed. 529, where it was held in effect that such land was ancestral and vested the fee in the father rather than a life estate. It was then brought to this court and dismissed for want of jurisdiction, for reasons above stated. So that, the proper construction and application of Chapter 49 of Arkansas, adopted by Congress and thus spread over

Indian Territory, has not been construed and its legal force determined by this court, so far as we know; but another of those adopted statutes did reach this court in the case of *Robinson and Coe* v. *Belt*, 187 U. S. 41, 47 L. ed. 65, points 2 and 3, where this court held:

> "2. The courts of the Indian Territory are bound to respect the decisions of the Supreme Court of Arkansas interpreting laws of that state which were adopted and extended over the Indian Territory by the Act of Congress of May 2, 1890.
>
> "3. An assignment for the benefit of creditors, although requiring a release by creditors as a condition of preference, must be deemed valid in the Indian Territory, in view of the decisions of the courts of Arkansas upholding such assignments under the statutes of that state concerning assignments for the benefit of creditors and the statute of frauds, which were adopted and extended over the Indian Territory by the Act of Congress of May 2, 1890 (26 Stat. L. 94, Sec. 31)."

In this case, this court stood by the former decisions of Arkansas in the construction of that statute and decided according to such decisions. It also cited various decisions of this court to the effect that in adopting statutes from other states or countries, the prior constructions thereof were likewise adopted and binding on the courts of the jurisdiction which thus adopted them; among these decisions is *Brashear* v. *West*, 7 Pet. 608, 8 L. ed. 801, and as to which, this court observed:

"In several subsequent cases the rule laid down in *Brashear* v. *West* has been adopted and the principle fully established that the construction and effect of a state statute regulating assignments for the benefit of creditors is one upon which the decisions of the highest courts of the state are a controlling authority in the federal courts. They are treated as establishing a rule of property applicable within their several jurisdictions. *Summer* v. *Hicks*, 2 Black. 532, 17 L. ed. 355; *Jaffray* v. *McGehee*, 107 U. S. 361, 27 L. ed. 495, 2 Sup. Ct. Rep. 367; *Peters* v. *Bain*, 133 U. S. 670, 686, 33 L. ed. 696, 702, 10 Sup. Ct. Rep. 354; *Randolph* v. *Quidwick Co.*, 34 L. ed. 200, 10 Sup. Ct. Rep. 635; *Union Nat. Bank* v. *Bank of Kansas City*, 136 U. S. 223, 235, 34 L. ed. 341, 345, 10 Sup. Ct. Rep. 1013; *South Branch Lumber Co.* v. *Ott*, 142 U. S. 622, 627, 35 L. ed. 1136, 1138, 12 Sup. Ct. Rep. 318.

The same rule has been held to be applicable to decisions of state courts construing the statute of frauds. *Allen* v. *Massey*, 17 Wall. 351, 21 L. ed. 542; *Lloyd* v. *Fulton*, 91 U. S. 479, 485, 23 L. ed. 363, 365.

Whatever might be our own views with regard to the validity of a release by creditors as a condition of preference under an assignment, the question is one which, upon the authorities above cited, must be held to be determinable by the state law as interpreted by the Supreme Court of such state."

The said Circuit Court adherred to the same rule of construction as shown in the case of *Blaylock* v. *Muskogee*, 117 Fed. 125, and other cases thereof

heretofore cited; and so did said state Supreme Court, as shown in *National Live Stock Commission Company* v. *Taliaferro*, 20 Okla. 177, and subsequent decisions of that court. Thus it will appear, as heretofore stated, that the construction and the interpretation of Chapter 49 had become a rule of property long before the same was thus adopted, and it remained a rule of property ever after their adoption by Congress and put into effect in said Indian Territory. The statute, being adopted by Congress, makes it an Act of Congress; and a construction of a federal statute never becomes final until the same is construed by this court, *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 492, 45 L. ed. 1200, where this court observed:

> "Federal statutes must be interpreted by the federal courts independently of local considerations, and cannot be said to have an established meaning, whatever the decisions of the other courts may have been, until they are *construed by the Supreme Court of the United States.*"

Yet, in the face of the fact that Chapter 49 by these prior constructions had become a rule of property in the Indian Territory and that said *Shulthis* decision could not thus become a rule of property, for the reasons above given, said state Supreme Court stood by it in its decision in this *Pigeon* case, simply as a rule of property. If the *Shulthis* decision could not thus become a rule of property, then

it is apparent that the foundation of the *Pigeon* case at once disappears and leaves the same wholly unsupported.

In the *Pigeon* case, that court observed:

> "Many titles to lands on the east side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property" (referring to the *Shulthis* decision).

In the first place, said decision could not legally become a rule of property, for the reasons above named; and in the second place such decision had not been in existence long enough to operate as a rule of property, as the decision was rendered in June, 1909, after which it was appealed to this court, where it remained until June 7, 1912; and this *Pigeon* decision was rendered in April, 1913, which was less than a year from the time the *Shulthis* decision was dismissed by this court. This is not time sufficient to establish a rule of property, and that especially as to the construction of a federal statute by subordinate courts and without ever having received the construction of this court.

This *Pigeon* case was decided on the petition of the plaintiff and the demurrer thereto of the defendant below. Consequently, no evidence whatever is to be found in that case; and we respectfully submit that said state Supreme Court was not justified by the record in that case in saying that "many titles to lands on the eastern side of this state have been

acquired on the strength of this decision;" as there is no evidence in that case to establish that fact.

In a very learned and able treatise on these Indian lands, entitled "Indian Land Laws" (second edition, 1913), Mr. Bledsoe refers to these *Shulthis* and *Pigeon* decisions, in Section 244 thereof, and as to which he makes the following observations:

> "If the unconditional fee to the tribal lands had been in the members of the tribe, and allotment had meant only partition of an estate, the estate received by the allottee would have been ancestral. Such was not the case. The estate in the land held by a member previous to allotment was a mere right of possession and could be alienated only to a member of the tribe. The estate received by the allottee is an absolute fee simple, including the possibility of reversion vested in the United States prior to allotment. The estate thus received by the allottee is a larger and more valuable one than his previous possessory right. He takes by deed or patent from the governor or principal chief of his tribe, acting on behalf of the tribe and without reference to whether his father or mother or both be living or dead.
>
> For nearly ten years it was practically the unanimous opinion of lawyers residing in the Eastern District of Oklahoma that the estate of the allottee is a new acquisition and not an ancestral estate. This was based upon uniform interpretations given to this statute by the Supreme Court of Arkansas, under conditions somewhat similar, though not identical, to those in the Indian Territory.

About the time the bar regarded the matter as settled the Circuit Court of Appeals for the Eighth Circuit held the estate of an allottee of the Creek Nation to be ancestral, and not a new acquisition. A review of this decision was sought in the Supreme Court of the United States, but the same was dismissed for want of jurisdiction.

The Supreme Court of the state has very recently followed the construction given to the Arkansas statute of descent by the Circuit Court of Appeals for the Eighth Circuit, holding the estate received by the allottee in allotment to be ancestral and not a new acquision. The case involved the construction of the Arkansas statute of descent as applied to a full blood Creek Indian who died July 12, 1905, after receiving her patent, intestate, leaving surviving her a husband, father, mother, sister and two brothers all full-blood Creeks. The father, mother and husband joined in a conveyance, and the sister and brothers brought suit to recover the property and clear title thereto.

After quoting from the opinion of the Cirsuit Court of Appeals in the *Shulthis-McDougal* case the court concludes as follows: 'Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there. * * * '

A writ of error has been sued out to have the judgment of the Supreme Court of the state in this case reviewed by the Supreme Court of the United States.

It is extremely desireable that it be finally adjudged, and without delay, whether the estate received by an allottee of the Five Civilized

Tribes is ancestral or a new acquisition, and the uncertainty of the law upon this subject is a source of great embarrassment in the development of the country. The author has never believed the rule prescribed in the case of *Shulthis* v. *McDougal* is sound or in harmony with either the language of the Arkansas statute or its interpretation prior to its extension over the Indian Territory. Neither does he believe that the rule there declared is capable of affording a solution of the difficulties arising out of the descent of allotted Indian lands.

The ancestral estate under the Arkansas statute is the estate of inheritance under the common law enlarged so as to include a gift, grant or devise made by either of the parents. In such a case the estate descends to the children and their descendants, and in the absence of children or their descendants it ascends to those of the blood through whom the estate came, to the exclusion of those of the blood of the other parent. In estates of inheritance, in the absence of descendants, the property goes exclusively to the heirs of the deceased who are of blood of the ancestor from whom the estate came, and in no event does such an estate ascend to any one who is not of the blood of the ancestor.

The new acquisition is substantially the estate by purchase of the common law, limited by having carved out of the same estates by gift, grant or devise from the parents of either of them. In such a case the estate descends to the children and their descendants, and in the absence of children or their descendants ascends to the father for his lifetime, then to the mother for her lifetime, and then to the collateral kin-

dred in fee; the father's family being given preference only over the mother's family. Under the interpretation given to the Arkansas statute by the Circuit Court of Appeals for the Eighth Circuit and the Supreme Court of the state, the courts and lawyers of the state are presented with the problem of following an ancestral estate through two separate and distinct lines of heirship, something unheard of in ancestral estates, and which probably will be difficult in practical application.

It will be observed that the Circuit Court of Appeals held that, inasmuch as one of the parents was not of Indian blood, the full title passed to that parent who was of Indian blood.

In the case decided by the Supreme Court of the state both parents were of Indian blood and survived the allottee, and it was held that the estate passed in equal moieties to the father and mother. Suppose that the father or mother only had survived, would the entire estate have gone to the survivor, or would it have gone half to the survivor and half to the heirs of the deceased parent? Upon the death of either of the parents without descendants, where both parents survive the allottee, by what rule is the right of descent to be determined?

These are only a few of the perplexing questions that will arise from the establishment of a rule creating two separate and independent ancestors to and from whom the descent of an ancestral estate must be followed."

We join in the declaration of Mr. Bledsoe that ten years prior to this decision in the *Shulthis* case, allotments of these Indians were considered as

new acquisitions by the profession in the eastern part of Oklahoma, and the matter was supposed to be so settled under the prior decisions of the Supreme Court of Arkansas in construing Chapter 49. But these decisions have left matters in a chaotic condition; and the fact that this *Pigeon* case and another subsequent decision of said state Supreme Court of like nature have already been appealed to this court, and another branch of this same *Shulthis* controversy is now in preparation for this court on the same subject, will, perhaps, serve as an indication that the legal profession of said state have not acquiesced in the *Shulthis* or the *Pigeon* decision; and that it will take a decision of this court to finally settle and determine this matter.

It will be observed from this *Pigeon* decision that the same was not rendered by the full bench of that Supreme Court, as Justice WILLIAMS did not participate in the decision. It will further appear from the decision that said Supreme Court did not fully adopt or corroborate this *Shulthis* decision, for it stood by it simply as a rule of property. This of itself is a virtual admission that the *Shulthis* decision is wrong in law and principle; for, had the decision been founded on sound legal principles, it would not have been necessary for said Supreme Court to have adopted it as a rule of property, and the decision would have stood as the correct exposition of said Chapter 49, and thereby would have been the law itself. I believe a rule of property is

based on two propositions: *first*, that the decision on which it rests was erroneous when delivered; *second*, that it had stood and been followed by the courts and citizens of this jurisdiction so long that it had become established and that it would be a greater injury to overrule it than to follow it. We admit that the *Shulthis* decision is erroneous, but we deny that the same has stood long enough, and been acquiesced in by the courts and people of eastern Oklahoma, to become a rule of property, as the same had become final in less than one year before the decision in the *Pigeon* case.

There is another reason why both the *Pigeon* case and the case at bar were erroneous. In each case the allottee died seized and possessed of his allotment, subsequent to the 28th of April, 1904, and prior to statehood. Whatever rights, therefore, the plaintiffs in error in these cases acquired in such allotments they acquired under the laws then in force in Indian Territory, and new laws or decisions contrary to said prior decisions could not be invoked to destroy their rights in these allotments.

Section 1 of the Schedule of the Constitution of the State of Oklahoma provides in part that: "No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place;" and this feature was adherred to by said state Supreme Court

in *Turner* v. *Crail*, 24 Okla. 135, 103 Pac. 574, following 23 Okla. 166, 100 Pac. 23. This would have been the law anyway, regardless of this provision of the constitution, as vested rights in property are preserved by the Fifth Amendment to the Constitution of the United States, and cannot be destroyed by subsequent laws to the contrary or in violation of such rights and claims.

Again, by Section 1 of the Enabling Act, the Indian, his lands, and property, was exempt from said constitution and reserved to the control of Congress, the same as if said act had not been passed.

So that these prior constructions of Chapter 49 by the Supreme Court of Arkansas were in full force and effect at the time the plaintiffs in error in this case and that of *Pigeon* v. *Buck*, acquired their rights at the time of the death of such allottees; and said chapter and such prior constructions thereof had become a rule of property in said Indian Territory prior to said deaths and was then still in force. Under these principles and this provision of the Constitution of Oklahoma it was not competent to deprive them of their rights in such allotments. Black on Interpretation of Laws, Section 143, where the author observed:

> "*143.* Where rights of property have accrued, and contracts have been made, in reliance upon the judicial construction of a statute, and were valid at the time of their inception under such construction, a subsequent decision,

overruling prior decisions and reversing the construction established thereby, will not be allowed to retroact, so as to destroy those rights or invalidate these contracts."

The force of precedents in such matters is also pointed out by this author on page 409, and thereafter, to which the attention of the court is directed, and where many features thereof are set forth and discussed.

REPEAL OF SECTION 6 OF THE SUPPLEMENTAL CREEK AGREEMENT.

This section has been set forth in a previous part of this brief, from which it will be observed that there is attached thereto two provisos, after putting Chapter 49 of Arkansas in force in the Creek Nation by its previous terms. The use of a proviso in a statute is various, but generally speaking it constitutes an exception to the general act or section thereof to which it is applied. Here Chapter 49 was put in force in said nation, and, without such proviso, there can be no dispute that it would have the same operation and legal effect in said Creek Nation as to its citizens and their property, as it had in the State of Arkansas, had it not been for these provisos, which constitute an exception to that rule. In the 11th volume of Encyclopedia of United States Supreme Court Reports, page 173, the author observed:

"3. *Provisos and Exceptions*—a. *In General.*—The law does not attach a fixed and invariable meaning to a proviso. Its provisions are to be construed by the same rules as the provisions of the enacting clause.

b. *As Exceptions to Enacting Clause.*—The general rule is that the purpose and effect of a proviso is to make an exception from the enacting clause, to restrain generality and to prevent misinterpretation, but it is frequently in Acts of Congress used to introduce new matter extending rather than limiting that which precedes. It is not presumed that the legislature intends to limit by a proviso the whole of the power granted by the statute. The word provided is used in our legislature for many purposes besides that of expressing a condition.

c. *As Repeal of Enacting Clause.*—A proviso cannot be considered as a repeal or a change of the body of a section where it does not contradict it, but is in harmony and consistent therewith.

d. *Construed Strictly.*—Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. When it is shown that a person comes within the general provisions of an act, the burden of proof is upon him to show that he comes within an exception thereto. The rules in regard to burden of proof and construction are the same in this case" (citing a great many decisions of this court as authority).

The plaintiff in error is clearly entitled to a life estate in the lands in controversy, under the prior construction of Chapter 49; and Chapter 49 is expressly put in force in said nation by said section. The enacting clause of that statute is general in its language and object. Therefore, these provisos are construed strictly, and take no case out of the enacting clause which do not fall fairly within their terms. The plaintiff in error comes within the general provisions of the act, as shown by these prior decisions. Then the burden of proof is upon the defendant in error to show that he comes within the provisions of these two provisos. We have previously stated in this brief that a life estate in a new acquisition is not inconsistent with the vestiture of the fee to the lands; and it is upon the defendant in error to show that a life estate is inconsistent with the fee. It is also pointed out that it was held in *Armstrong* v. *Wood*, 195 Fed. 137, that these provisos related to the surplus or unallotted lands of the said Creek Nation, and not to an allotment which had actually been received by an allottee. If any of these positions be correct, and the burden is thus imposed upon the plaintiff in error to prove their inconsistency, then it follows that the decisions of said state courts are clearly erroneous. But we do not rest with these propositions, but insist that said Act of Congress of April 28, 1904, repealed said Section 6 altogether. As we have heretofore cited, the only difference or distinction between Chapter 49

and the provisions of said Section 6, is simply the provisos, which said section contain, for said section included said Chaper 49 *plus* these provisos. Then when Chapter 49 was again spread over Indian Territory under this Act of April 28, 1904, if such was the effect of that statute, it would be futile and an idle undertaking to say that said Section 6 with its provisos and said Chapter 49 without such provisos could remain in full force and effect in the same jurisdiction, without the one being repugnant to the other, notwithstanding the opinion delivered in the case at bar by said state Supreme Court wherein it observed:

> "In an able and exhaustive brief, which gives in an interesting and instructive manner a complete *resume* of the various enactments on this particular subject in the Indian Territory since 1890, plaintiff in error contends that the last mentioned Act of Congress repeals Section 6 of the Supplemental Creek Treaty, *supra*. We cannot concur in this opinion. There is no repealing clause attached to the Act of April 28, 1904, and if the said Section 6 was repealed it would be by implication, and the law does not look with favor upon such repeals. Then, too, the Act of April 28, 1904, is a general act, while the Supplemental Creek Agreement of June 30, 1902, is a special act, and nothing in the general act can work as repeal of the special act unless the language used, and the objects and purposes intended, permits of no other conclusion. We fully agree with counsel that where two statutes are so repugnant to each other that they can not stand or be construed together, the first

in point of time is repealed by the last, if not expressly, then by necessary implication. But we do not agree that there is such conflict or repugnancy between these two acts. The intent of the lawmaker is to be deduced and gathered from the whole statute and by a comparison of other statutes, *pari materia*.

We must also concede the soundness of the proposition laid down in *District of Columbia v. Hutton*, 143 U. S. 18, 36 L. ed. 60:

> 'Where two acts are repugnant in any of their provisions, the later act, witout any repealing clause, operates to the extent of the repugnancy as a repeal of the first. Where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.'

But a careful examination of these statutes fails to show any such conflict or repugnancy as would warrant us in saying that a repeal by implication of Section 6 of the Supplemental Creek Agreement, *supra*, was had. On the contrary, the conflict between the two is largely a creature of the imagination, as an examination of those statutes will readily disclose. The Act of April 28, 1904, was evidently passed for the sole purpose of taking from the tribal courts their criminal, civil and probate jurisdiction, and vesting it in the United States Courts of the Indian Territory, and by Section 2, especially to set at rest all doubts as to whether or not United States Courts could and did have, probate jurisdiction, and the act also provided addi-

tional facilities in the matter of extra judges and court towns. There was no attempt to provide by said act a new law of descent and distribution. There is nothing in the act that will warrant such an inference or justify such a conclusion. The *action* of the Act of April 28, 1904, complained of reads as follows:

> 'All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estate in said Territory, whether Indian, freedmen or otherwise.'

This part of said section does not repeal any law in force in the Indian Territory except those acts which excluded certain persons and estates from the operation of the law of Arkansas (and the tribal laws did so to a certain extent), making their misdemeanors, and certain felonies, punishable by the United States laws (which are the Arkansas laws), and bringing their estates within the scope of the Arkansas laws for probate purposes. Certainly no other construction can be given to that part of Section 2, while the balance of said section deals with the jurisdiction of the Indian Territory courts as witness:

> 'And full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlement of all estates of decedents, in guardianship of minors, and incompetents, whether Indian, freedmen or otherwise.'

This gave to the United States Courts probate jurisdiction in all those enumerated classes of cases, in some of which jurisdiction had not

theretofore been exercised. And as is well said by counsel for defendant in error in his brief:

> 'It also set at rest any doubt which there might be of a United States Court having such jurisdiction.'

Certainly there is no repeal of Section 6 of the Supplemental Creek Treaty in this section. This Act of April 28, 1904, *supra*, put in force in the Indian Territory the laws of Arkansas, in certain classes of cases where certain tribal laws had theretofore controlled, but did not in any manner effect the provisions of the special act known as the Supplemental Creek Treaty, of June 30, 1902. To hold that it did would also in like effect hold that it would repeal all the restrictions upon alienation of Indian lands; the provisions for special United States Courts; all tribal tax laws; all laws forbidding taxing of Indian lands, etc., indeed, very few, if any United States Laws would be left in force in the Indian Territory, for, as counsel contends, only such laws would be in force as had theretofore been put in force from the Statutes of Arkansas. We do not deem further consideration of this subject necessary. Undoubtedly the devolution of the land embraced in this controversy is controlled by Section 6 of the Supplemental Creek Treaty, *supra*, and such being the case, it is plainly apparent that the plaintiff, George Washington, the full-blood Seminole father of Waitie Washington, a half-blood Creek, did not inherit any interest in his allotment, and, therefore, the judgment of the District Court of Hughes County should be affirmed."

Here the first ground assigned in this opinion, as shown by this excerpt, for holding that the Act of Congress of April 28, 1904, did not repeal Section 6 of said Supplemental Creek Agreement, is that "the Act of April 28, 1904, is a general act, while the Supplemental Creek Agreement of June 30, 1902, is a special act, and nothing in a general act can work as repeal of the special act unless the language used, and the objects and purposes intended, permit of no other construction."

This suggests, *first*, is "the Supplemental Creek Agreement of June 30, 1902, (is) a special act"?; *second*, is not said Act of April 28, 1904, totally repugnant to said Section 6, according to its language used and the objects and purposes intended? This Supplemental Creek Agreement is entitled "An Act to Ratify and Confirm a Supplemental Agreement With the Creek Tribe of Indians, and for Other Purposes;" and its object and purpose, as shown on the face of the treaty itself, was to supply and modify certain provisions of the Original Creek Agreement, and to repeal such parts thereof as were in conflict with such Supplemental Treaty. This Original Creek Agreement provided the laws of descent and distribution of the Creek Nation as the law of descent for said nation and to govern the descent of the property of the tribes of said nation. Section 6 of this Supplemental Creek Agreement expressly repealed that law of descent and substituted therefor Chapter 49 of Arkansas with the provisos

attached. Of course, these Original and Supplemental Creek Agreements applied to only members of said Creek tribe and their property; and other citizens living and residing in said nation were not in anywise affected by the provisions of said treaties, as they had long before been provided for in the Act of Congress of May 2, 1890, which first placed these Statutes of Arkansas in force in the Indian Territory. But in section 30 of said Act of May 2, 1890, it is expressly provided:

> "*Provided, however*, That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian Territory by this act shall not apply;"

and the last part of Section 31 thereof, further provides:

> "But nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils, where such laws are not contrary to the treaties and laws of the United States."

It therefore follows that in the Creek Nation and all the other Five Civilized Tribes that said statutes thus put in force in said territory by this Act of May 2, 1890, had no application to the members of such tribe or their property, except where such a member might be a party to a suit with someone foreign to their tribe; but that such tribes were left to govern their own domestic affairs according to their own laws and under their own courts. In order to annul that provision or condition and to repeal the laws of said tribes and to abolish their courts, Congress passed a law known as the Curtis Bill, approved on the 28th of June, 1898, wherein it provides in Section 26 thereof "that on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory;" and by Section 28 thereof it is provided "that on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished * * * and all civil and criminal causes then pending in any such court shall be transferred to United States Courts in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not be in force as to the Chickasaw, Choctaw and Creek Tribes or Nations, until the first day of October, eighteen hundred and ninety-eight."

It will be remembered that Indian Territory was occupied mainly by these Five Civilized Tribes,

with, and for whom, Congress was continuously legislating both generally, as a Territory of the Union, and with each separate tribe. But in each and every enactment the same was general where they applied to the Indians and their property, regardless of whether the enactment applied to a single tribe, or to all of the tribes conjointly. Prior to these recent treaties and also including them, Congress generally legislated for, and treated with, each tribe separately. But such acts and treaties applied indiscriminately to all the members of the tribe to which the act applied, except in a few instances, such as providing only forty acres for freedmen in the Chickasaw and Choctaw Nations, as shown in these recent treaties with said nations. Such was the nature and character of the Original and Supplemental Creek Agreements. There Congress was treating alone with the Creek Tribe of Indians, whose membership was to be ascertained and determined by Section 21 of said Curtis Bill, and as provided for in Section 28 of this Original Creek Agreement, which related back and included the provisions of said former section. But these Creek treaties applied indiscriminately to each and all the members of the Creek tribe, and whereby each member was equally protected in every respect. It, therefore, follows that said Creek treaties were not special Acts of Congress at all, but were general acts applying indiscriminately to the whole Creek Nation and equally protecting the rights and

interests of its members and their property. This Supplemental Creek Agreement was intended to operate, of course, only in the Creek Nation; but as to said nation, it was as general, as was the Acts of Congress of April 28, 1904, April 26, 1906, and May 27, 1908, as to the whole Five Civilized Tribes, and their members and property.

By Section 6 of this Supplemental Creek Agreement, Congress provided the general laws of descent, which affected not only the members of the Creek tribe, but likewise, "*non-citizen heirs,*" as therein provided; but all of such heirs were to be determined by Chapter 49 of Arkansas, thus made a part of this section. This section applied equally and uniformily to the estate of every Creek deceased member of said tribe, after the passage of this act and so long as it existed. It would hardly be contended that this Original Creek Agreement, according to its express terms, provisions and conditions, was not a general law applicable to said Creek Nation, its members, and their property, and its final disposition including even the law of descent therein provided for. By this Curtis Act, in June, 1898, Congress had abolished the laws and courts of the Five Civilized Tribes; and indisputably Congress had the right to legislate not only for the Five Civilized Tribes, but likewise for each tribe separately, and for other citizens or people living and residing among said tribe. This is provided for in the Constitution of the United States, whereby Congress is

given power to regulate commerce among the states and Indian tribes, and to prescribe such rules and regulations for the government of its territories as it may see proper. Under this authority, Congress passed the Original and Supplemental Creek Agreements. In the case of *Town of Unity* v. *Burrage*, 103 U. S. 444, 26 L. ed. 405, point 3 of the syllabus, this court held:

> "Where an act is declared in its express terms to be a public one, another which supplements and amends it and thereby becomes a part of it, is a public act."

It will not be denied that this Supplemental Creek Agreement was a supplement or amendment to this Original Creek Agreement; for Section 20 thereof provides:

> "This agreement is intended to modify and supplement the agreement ratified by said Act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement, treaty, or law in conflict herewith."

It must therefore follow, under the decision of this court last above cited, that this Supplemental Creek Agreement, on its enactment, became a general law as to said Creek Nation and its members, and was not a special act as supposed in this opinion of said state Supreme Court, delivered in the case at bar.

In volume 7 of Words and Phrases Judicially Defined, pages 6577 and 6578, it is there observed:

"'*Special Law.*' *See, also,* '*Local Law.*' A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things as a class is a special one. *Ewing* v. *Hoblitzelle*, 85 Mo. 64, 78; *Schmalz* v. *Wooley*, 39 Atl. 539, 542, 56 N. J. Eq. 649; *In re. New York Elevated R. Co.*, (N. Y.) 3 Abb. N. C. 401, 417, 422; *Gay* v. *Thomas*, 46 Pac. 578, 586, 5 Okla. 1; *Clark* v. *Finley*, 54 S. W. 343, 345, 93 Tex. 171; *Hamman* v. *Central Coal & Coke Co.*, 56 S. W. 1091, 1092, 156 Mo. 232; *State ex rel. Harris* v. *Herrmann*, 75 Mo. 340, 346; *Lynch* v. *Murphy*, 119 Mo. 163, 24 S. W. 774; *Sawyer* v. *Dooley*, 32 Pac. 437, 440, 21 Nev. 390; *Herbert* v. *Baltimore County Com'rs*, 55 Atl. 376, 379, 97 Md. 639.

Special laws are those made for individual cases, or for less than a class requiring laws to its peculiar conditions and circumstances. *Vermont Loan & Trust Co.* v. *Whithed*, 49 N. W. 318, 320, 2 N. D. 82; *Guthrie Dailey Leader* v. *Cameron*, 41 Pac. 635, 639, 3 Okla. 677; *Maxwell* v. *Tillamook County*, 26 Pac. 803, 805, 20 Or. 495 (quoting *Healey* v. *Dudley* (N. Y.), 5 Lans. 115; Suth. St. Const. Sec. 127); *Groves* v. *Grant County Court*, 26 S. E. 460, 463, 42 W. Va. 587 (citing 1 Bl. Comm. 186).

A special statute is one operating upon one or a portion of a class, instead of upon all of a class. *State* v. *Irwin*, 5 Nev. 111, 120.

'Local or special legislation,' according to the well-known meaning of the words, applies exclusively to special or particular places, or special and particular persons, and is distinguished from a statute intended to be general in its operation and that relating to classes of

persons or subjects. *Stone* v. *Wilson*, (Ky.) 39 S. W. 49, 50.

'Special acts' are statutes applying to particular places or districts. A corporation organized under a charter passed for no other purpose than its creation is organized under a special act. *Sargent* v. *Union School Dist.*, 2 Atl. 641, 642, 63 N. H. 528.

'Private or special statutes,' says Sedgwick in his work on Statutory and Constitutional Law, 'relate to certain individuals or particular classes or men.' In Smith on Constitutional Construction it is said: 'The distinction between public and private statutes is this: A general or public act is a universal rule that regards the whole community, but special or private acts are rather exceptions than rules, being those which operate upon private persons and private concerns.' Page 917, Sec. 802. *People* v. *Wright*, 70 Ill. 388, 398.

A special act is one which only operates on particular persons and private concerns. *Town of McGregor* v. *Boylies*, 19 Iowa 43, 46 (citing Bl. Comm.)."

To the same effect is the decision of said state Supreme Court itself in *State ex rel., etc.*, v. *Indian Territory Illuminating Co.*, 32 Okla. 607, 123 Pac. 166 (opinion filed April 9, 1912), where said court held:

"1. *Evidence—Judicial Notice—Private Acts.* An Act of Congress (Act March 3, 1905, c. 1479, 33 Stat. 1061) approving a lease upon 680,000 acres of land in the Osage Nation, and extending its operation for a period of ten years, for the benefit of the lessee and its sub-

lessees, is a private act, and the courts cannot take judicial notice of it.

2. *Statutes—Construction—'Private Act.'* Private acts are those which operate only on particular persons and private concerns, in contradistinction to those which regard the whole community (citing 6 Words and Phrases, 5567)."

This work gives other illustrations of special and local enactments, but we suppose that the authority herein cited is sufficient to establish that this Supplemental Creek Agreement is not a private, special or local statute, but that the same extended to the whole Creek tribe and its citizens and their property, which has ever been treated as a distinct political body. To this Nation of Indians alone and to "non-citizen heirs," this act was intended to extend; but as to that nation and its people the act is general and applies equally and indiscriminately to all its citizens and their property, as above stated. The fact that Section 6 of this act contains these provisos does not make the act or even this particular section, a special act, for it applies to each and all the members of said tribe, and not to any particular person, member or class of that tribe, and Chapter 49 with such provisos as so embraced in said section is made applicable to the descent of the property of every such deceased member of that tribe.

The only ground we can conceive of on which it could be claimed that this supplemental agree-

ment was a special act, is simply because it applied alone to the Creek estates. But such a notion could not prevail for it was only such estates and the disposition thereof that was intended by Congress to be affected by this act; and the terms of the act are by its express provisions made applicable to all such members alike, and thereby became a general act, as to said Nation or Tribe of Indians thus treated with as a separate, distinct and political body, holding its tribal relations, and within well defined and prescribed territorial limits, set apart to this tribe by former Acts of Congress itself and ever thereafter to the present time recognized by Congress as a separate and distinct community of people with the right to use and occupy the lands of said nation expressly given to it by this grant of the government, dated the 11th of August, 1852.

But even if it be conceded that said Supplemental Agreement was in its nature local because applying only to said Creek Nation, still we insist that the provisions of section 6 in said act, including said proviso, was repealed by this Act of Congress passed on the 28th of April, 1904; and as further authority on this feature we cite the decision of this court styled *Cherokee Tobacco* v. *United States*, 78 U. S. 616, 20 L. ed. 228, 229.

This was a case where the government undertook to enforce the payment of revenues for the sale of tobacco in the Cherokee Nation under an Act of

Congress entitled "An Act Imposing Taxes on Distilled Spirits, and for Other Purposes," approved July 20, 1868. The defendants therein maintained that said act did not apply to the Cherokee Nation for the reason that said act was in violation of the tenth article of the Treaty of 1866, between the Cherokee Nation and the United States, which was in full force and effect when this Act of 1868 was thus passed by Congress. In delivering the opinion of this court in that case Justice SWAYNE, in part, observed:

> "The only question argued in this court, and upon which our decision must depend, is the effect to be given respectively to the 107th section of the Act of 1868, and the 10th article of the Treaty of 1866, between the United States and the Cherokee Nation of Indians.
>
> They are as follows:
>
> '*Section 107.* That the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff and cigars, shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not.' 15 Stat. L. 167.
>
> '*Article 10th.* Every Cherokee Indian and freed person residing in the Cherokee Nation shall have the right to sell any products of his farm including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax

thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory.'

On behalf of the claimants it is contended that the 107th section was not intended to apply, and does not apply, to the country of the Cherokees, and that the immunities secured by the treaty are in full force there. The United States insist that the section applies with the same effect to the territory in question as to any state or other territory of the United States, and that to the extent of the provisions of the section the treaty is annulled.

Considering the narrowness of the questions to be decided, a remarkable wealth of learning and ability have been expended in their discussion. The views of the counsel in this court have rarely been more elaborately presented. Nevertheless, the case seems to us not difficult to be determined, and to require no very extended line of remarks to vindicate the soundness of the conclusions at which we have arrived.

In *The Cherokee Nation* v. *Georgia*, 5 Pet 17, Chief Justice MARSHALL, delivering the opinion of this court, said: 'The Indian Territory is admitted to compose a part of the United States. In all our geographical treatises, histories and laws, it is so considered.' In *The U. S.* v. *Rogers*, 4 How. 572, Chief Justice TANEY, also speaking for the court, held this language: 'It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are sub-

ject to their authority, and where the country occupied by them is not within the limits of one of the states, Congress may, by law, punish any offense committed there, no matter whether the offender be a white man or an Indian.' Both propositions are so well settled in our jurisprudence that it would be a waste of time to discuss them or to refer to further authorities in their support. There is a long and unbroken current of legislation and adjudications, in accordance with them, and we are aware of nothing in conflict with either. The subject in its historical aspect was fully examined in *Johnson* v. *McIntosh*, 8 Wheat. 574. In the 11th section of the Act of the 24th of June, 1812, it was provided 'That it shall be lawful for any person or persons to whom letters testamentary or of administration shall have been or may hereafter be granted by the proper authority in any of the United States or the territories thereof to maintain any suit,' etc. In *Maxey* v. *Cove*, 18 How. 103 (59 U. S. XV 301), it was held that the Cherokee country was a territory of the United States, within the meaning of this act. The 107th section of the Act of 1868 extends the revenue laws only as to liquors and tobacco over the country in question. Nowhere would frauds to an enormous extent as to these articles be more likely to be perpetrated if this provision were withdrawn. Crowds, it is believed, would be lured thither by the prospect of illicit gain. The consideration, doubtless had great weight with those by whom the law was framed. The language of the section is as clear and explicit as could be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it

is not for this court to make the exception. If the exemption had been intended it would doubtless have been expressed. There being no ambiguity, there is no room for construction. It would be out of place. *U. S.* v. *Wiltberger*, 5 Wheat. 95. The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it. *Morehouse* v. *Rennell*, 1 Clark & F. 527; *Wolff* v. *Koppel*, 2 Den. 372. Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. The effort may confuse and obscure but cannot enlighten. It never strengthens the pre-existing conviction.

But conceding these views to be correct, it is insisted that the section cannot apply to the Cherokee Nation because it is in conflict with the treaty. Undoubtedly, one or the other must yield. The repugnancy is clear and they cannot stand together.

The 2d section of the 4th article of the Constitution of the United States declares that 'this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land.'

It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. The effect of treaties and Acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper

solution. A treaty may supersede a prior Act of Congress (*Foster* v. *Neilson*, 2 Pet. 314) and an Act of Congress may supersede a prior treaty. *Taylor* v. *Morton*, 2 Curt. 454; *The Clinton Bridge*, 1 Woolw. 155. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the Act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

Does the section thus construed deserve the severe strictures which have been applied to it? As before remarked, it extends the revenue laws over the Indian territories only as to liquors and tobacco. In all other respects the Indians in those territories are exempt. As regards those articles, only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians? The frauds that might otherwise be

perpetrated there by others, under the guise of Indian names and simulated Indian ownership, is also a consideration not to be overlooked.

We are glad to know that there is no ground for any imputation upon the integrity or good faith of the claimants who prosecuted this writ of error. In a case not free from doubt and difficulty they acted under a misapprehension of their legal rights.

The judgment of the District Court is affirmed."

Here the matters presented were whether an Act of Congress extending to all United States had application in the Cherokee Nation; *second*, if it did, then was this act in violation of section 10 of this treaty between the United States and the Cherokee Nation, which exempted farm products from taxation, etc.; and, *third*, whether said general Act of Congress thus repealed the provisions of said Section 10. It was held that said general act did extend to the Cherokee Nation; and while it is antagonistical to said Section 10, it was enforceable in said Cherokee Nation against the members of said tribe, and therefore necessarily repealed said Section 10 to the extent of said general act, as therein held.

If this general Act of Congress, applicable to the whole United States, operated as a repeal of this particular section of this treaty with the Cherokee Nation, it must necessarily follow that when Congress passed the Act of April 28, 1904, that act would

likewise repeal section 6 of the Supplemental Creek Agreement; for, this Act of April 28, 1904, was made applicable to, and put in force in, Indian Territory only, which embraced said Creek Nation and the act expressly provides that "all the laws of Arkansas put in force in the Indian Territory are hereby continued and extended in their operations, so as to embrace all persons and estates in said Territory, whether *Indian, freedman or otherwise.*" Thus, not a *part*, but *all* the laws of Arkansas heretofore put in force in Indian Territory were continued and extended in their operation, so as to embrace all *persons and estates* in said Territory; and that, too, regardless of "whether Indian, freedman or otherwise." This unquestionably included every person and his estate in Indian Territory at that time and thereafter "*whether Indian, freedman or otherwise.*" This of course, included all persons and estates in the Creek Nation the same as in all other parts of Indian Territory, regardless of whether such persons were "Indian, freedman or otherwise." This Act of April 28, 1904, was therefore a general Act of Congress extending over all Indian Territory and it embraced all persons and their estates in said Territory. There is no reservation or exception to this act, and it must be construed according to the plain intent of Congress as indicated by the plain and ordinary words and intent of the statute. If Congress had intended that said act should not have a uniform application to

all persons and estates in said Territory, it could have easily so provided, as indicated in the above decision and in *The New Jersey Steamboat Co.* v. *Pleasonton*, 21 L. ed. 771, where this court observed:

> "The 9th section of this act declares that the tax here in question shall be paid. The proviso in the Act of 1865 declares that it shall not be paid.
>
> Can there be a clearer inconsistency than that which subsists between these provisions? If Congress intended that the exception should continue under the Act of 1866, as it was under the Act of 1864, it would have been easy to say so and, doubtless, this would have been done."

So we might add in this particular case that if Congress had intended to except the Creek Nation, or this Supplemental Creek Agreement, or even Section 6 thereof, whose provisions including the provisos are absolutely repugnant to Chapter 49 of Arkansas, without such provisos, Congress could easily have made this exception in the act, and perhaps would have done so if any such an exception had been intended; but the fact that it did not do so is apparent that no such an intention of Congress was ever designed, for this Act of April 28, 1904, puts the statutes back in force in Indian Territory without any such expression as "as far as applicable" or "not locally inapplicable" or "not in conflict with this act or any Act of Congress, such as characterize the enactments of the Acts of May 2, 1890, February 19, 1902, and other Acts of Con-

gress." Not only this, but this act expressly and emphatically provides that these Statutes of Arkansas shall be continued and extended in their operation to all persons and estates in said Territory without any exception being made, but followed with the emphatic declaration that the same should apply to such persons and estates "whether Indian, freedman, or otherwise." Thus it is put even beyond conjecture by the express and emphatic provisions of the act itself that it should have a universal and uniform application throughout the whole Indian Territory, applicable to all persons and estates therein, regardless of whom they were, their race or previous condition. In support of our contention we come back to the same Supreme Court of the State of Oklahoma and cite as authority the case of *Hawkins* v. *Stevens*, 31 Okla. 849, 97 Pac. 567, which case involved the disposition of a Creek allotment, where the allottee died on the 15th of June, 1906, and left Martha Hawkins his widow, but who was a non-Creek citizen. The question arose whether this non-Creek widow took dower in said allotment. In the opinion in that case said Supreme Court set out and quoted said Section 6 of this Supplemental Creek Agreement. It, then, referred to this Act of April 28, 1904, and set out the second section thereof, it then referred to Chapter 53 in Mansfield's Digest of Arkansas, which provides for the widow's dower the same as does in the first section of said Chapter 49.

Here the allottee died on the 15th of June, 1906, which was after the passage of this Act of April 28, 1904, and left this non-Creek citizen as his widow; and in that case that court in the syllabus held:

> "*Indians—Creek Lands—Rights of Non-citizen Widow—Dower.* The non-citizen widow of an allottee of a quarter section of land of the Creek Nation, whose husband died in June, 1906, is entitled to dower in his estate, and until it is assigned to her is entitled to remain in and possess the home or house of her late husband, together with the farm thereto attached, free from all rent."

If the contention of the defendant in error to the effect that a non-Creek citizen cannot inherit the allotment of a deceased Creek, because of Section 6 of the Creek Supplement, was the law governing these matters, then it would necessarily have followed that Martha Hawkins, who was a non-Creek citizen could not have had dower in her husband's lands, who died in June, 1906; for there were other heirs of said decedent who had sold the lands to one of the parties to this suit. Here is a case where a Creek allotment descended after the Act of April 28, 1904, and in which case a non-Creek widow was held to have a life estate or dower in this allotment. This right to that dower we submit arose under this Act of April 28, 1904, as cited and referred to in that opinion. If so, this is a decision of that court in effect, that the Act of April 28, 1904, repealed Section 6 of the Creek Supplement. If this is not the

effect of this decision, then the decision is an exemplification of our contention previously presented in this brief, namely, that a life estate is not inconsistent with the fee, even though the lands should fall strictly under Section 6 of the Creek Supplement. If a non-Creek widow can take dower in a Creek allotment where the allottee died subsequent to the Act of April 28, 1904, we are impressed with the idea that it will be difficult to find legal grounds why a non-Creek father can't take a life estate in the allotment of his deceased child where he also died subsequent to that act, even though he was enrolled as a Creek, but in fact was only a half Creek, as pointed out in this opinion in the case at bar.

The existence and legal force and effect of this Act of April 28, 1904, was again recognized and enforced by said state Supreme Court *In re. Davis' Estate*, 32 Okla. 209, 122 Pac. 547, and *Taylor* v. *Parker*, 33 Okla. 199, 125 Pac. 573, in which last case said court held:

> "2. *Same — Restriction of Alienation — Wills.* The effect of the Act of April 28, 1904 (33 St. L. 573, c. 1824), was to make the laws of Arkansas, theretofore put in force in the Indian Territory, applicable to another class of persons and estates, to-wit, Indians and their property, in so far as it was alienable under the Acts of Congress then bearing upon it. The extension of the law of wills enabled the Indian to devise all his alienable property by will made in accordance with the laws of the State of Ar-

kansas, but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by Act of Congress."

Here said Supreme Court recognizes that under said act and under the extension of the law of wills thereunder, an Indian was enabled to devise all his alienable property by will "made in accordance with the laws of the State of Arkansas." If this be true then this is a positive decision recognizing that by putting the chapter on wills of the State of Arkansas in force in Indian Territory thereby making it applicable to the Indians, said act thereby repealed the provisions of Section 7 of the Original Creek Agreement and Section 16 of said supplement, whereby such Creek citizens could devise their homestead only and then only on condition that they left on children born after a particular date therein mentioned. If this Act of April 28, 1904, so enlarged, modified or repealed said Sections 7 and 16 by substituting the chapter on wills, why would it not have the same effect as to Section 6 of said supplement by likewise substituting said Chapter 49 that was also embraced and reinstated by said Act of April 28, 1904? Again, suppose we concede for the sake of argument that said Creek Supplement was a special act. Still, we contend that when Chapter 49 was put in force throughout Indian Territory and made applicable to all persons and estates whether Indian, freedman or otherwise, it was ab-

solutely repugnant to section 6 of said supplement and so repugnant that both provisions cannot exist together. It must be conceded that Section 6 with its provisos applied to only Creek citizens and their heirs. It therefore did not extend to all persons who lived and resided in the Creek Nation. Again, these provisos limited such estates to Creek citizens and their Creek descendants; except in the absence of such heirs it went to non-citizens of that nation. No such a provision as that is found in chapter 49 standing alone as it did under this Act of April 28, 1904, and the previous Acts of May 2, 1890, and May 27, 1902.

In *Ex parte In Matter of Kang-gi-shun-ca*, 109 U. S. 556, 27 L. ed. 1031, points 7 and 8, this court held:

> "7. Implied repeals of statutes are not favored; the implication must be necessary. To constitute a repeal there must be a positive repugnancy between the provisions of the new laws and those of the old.
>
> 8. A general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together."

The principle that repeals by implication is not favored and that a general statute will not repeal a special statute, are the grounds on which the decision of said Supreme Court mainly rests; but we

here insist that the implication of such repeal is necessary in order to carry out the object and purpose of Congress in passing this Act of April 28, 1904, which was to extend and apply all said Statutes of Arkansas throughout all Indian Territory and to make them operate as to the person and estate of every individual who then and thereafter lived in said Territory, regardless of whether they were Indian, freedman or otherwise. The very reason why said state courts held that the plaintiff in error in this case could not inherit from his deceased child and participate in his allotment, was purely and absolutely on the ground that he was a Seminole citizen and not a Creek, and that said son left other Creek heirs to take his inheritance and therefore the plaintiff in error was disinherited because of the proviso of Section 6 of said Creek Supplement. It was to avoid just such cases as this that Congress passed said act and gave said statute a universal and uniform application to all persons and estates in Indian Territory. Therefore, Section 6 which consists of Chapter 49 *plus* the provisos can never mean the same as Chapter 49 *minus* the provisos put back in force in Indian Territory by these acts. They are therefore so repugnant to each other that they cannot stand or be construed together. Hence, one must give way to the other; and said Act of April 28, 1904, being enacted last necessarily repealed Section 6, for "there is a necessary inconsistency in the two acts standing together;" and in

order to carry out the object of Congress this repeal by implication is inevitable and necessary, regardless of whether that repeal came about by implication or by substituting Chapter 49 under this Act of April 28, 1904, for Section 6 under this Creek Supplement. The same rule would hold good as to all the other tribes in said Territory.

Prior to this act these several tribes had different laws of descent at different times, while the white and other population existing in said Territory were governed by these laws and statutes of Arkansas put in force by this Act of May 2, 1890, the Indians, their laws and courts, were expressly reserved from that act in Sections 30 and 31 thereof, hereinbefore set out. It was therefore necessary to make these laws applicable to all classes of persons living in said Territory in order that the courts would have uniformity in the enforcement of the laws respecting all such people and their estates. These diversified laws not being alike in any two tribes and not having the same application as to all the people living within any one of the tribes, made it extremely inconvenient, and led to great difficulties and hardships not only on the people, but likewise the courts in enforcing these laws. Hence uniformity was a necessity, and to meet that necessity Congress passed this Act of April 28, 1904.

Hence, we insist that the principles laid down by this court in *District of Columbia* v. *Hutton*, 143

U. S. 18, 36 L. ed. 60, and other decisions of like charcter, have a complete application to the case at bar, and is sufficient to establish that the repugnancy between Chapter 49 and Section 6 of said Supplemental Creek Agreement is irreconcilable, and that said Act necessarily repeals said section, notwithstanding the opinion of said Supreme Court holds that "*the conflict between the two is largely a creature of imagination.*"

We also insist that there is an inconsistency in this opinion, which accords very closely with the inconsistency between Chapter 49 and said Section 6; for if their repugnancy was simply "a creature of imagination" it then had no existence in fact, and the plaintiff in error should have been decreed a life estate in the allotment of his deceased son, to which he was clearly entitled according to said Chapter 49, under all the decisions of the Supreme Court of Arkansas construing that chapter. But plaintiff in error was denied his interest in these lands; and this was put upon the express grounds that he was a Seminole citizen and there were other Creek citizens to inherit the lands in his stead. Thus, there is recognized in the decision a fatal repugnancy between said section and Chapter 49 and a recognition that they cannot both stand together, and by reason of which it was held that the plaintiff in error, being a Seminole citizen, could not inherit these lands because of these provisos. We are not able to reconcile the conclusion in this opinion that the

plaintiff in error could not inherit because he was a non-Creek citizen when it is fully determined that he could have inherited under Chapter 49, if it be true, as therein stated, that "the conflict between the two is largely a creature of imagination."

This decision seems to be further based on the notion that "The Act of April 28, 1904, was evidently passed for the purpose of taking from the tribal courts their criminal, civil, and probate jurisdiction and vesting it in the U. S. courts of the Indian Territory."

The laws and courts of these Indian tribes had been expressly annulled by Sections 26 and 28 of the Curtis Act on the 28th of June, 1898, as hereinbefore shown, wherein those sections were set out. Therefore, the reason given for the enactment of that act must necessarily fail, as the tribal laws and courts had been abolished for nearly six years before the act was passed.

Again, it is said in this opinion: "There is no attempt to provide by said act a new law of descent and distribution. There is nothing in the act that will warrant such an inference or justify such a conclusion;" yet, the same court, in *Hawkins* v. *Stevens*, *Taylor* v. *Parker* (decided May 14, 1912, which was after the decision in the case at bar, and the first mentioned case was prior to the case at bar), recognized this Act of April 28, 1904, as creating new laws among which was Chapter 49; and in *Tay*

lor v. *Parker*, it was there said: "The effect of the Act of April 28, 1904, * * * was to make the laws of Arkansas, theretofore put in force in the Indian Territory, applicable to another class of persons and estates, to-wit: Indians and their property," etc. In fact, this innovation is recognized on the very face of this opinion, wherein it observes:

> "This part of said section does not repeal any law in force in the Indian Territory except those acts which excluded certain persons and estates from the operation of the law of Arkansas (and the tribal laws did so to a certain extent, making their misdemeanors, and certain felonies, punishable by the U. S. laws), which were the Arkansas laws, and bringing their estates within the scope of the Arkansas laws for probate purposes."

In the first place, if said act actually repealed laws then in force in Indian Territory, which excluded certain persons and estates from the operation of the law of Arkansas, which included the tribal laws, and brought their estates within the scope of the Arkansas laws for probate purposes, as thus admitted and so held, it would be difficult to determine how the estate of Waitie Washington could thus have been brought before the United States Court and his estate thus administered upon "within the scope of the Arkansas laws for probate purposes," without, at the same time, such courts being bound by "the scope of the Arkansas laws" which, if thus properly administered, would

necessarily determine that the plaintiff in error was an heir to his deceased child, as provided in said chapter. In short, if the Act of April 28, 1904, put back these Arkansas Statutes for probate purposes, then Chapter 49 was put back and was one of the probate statutes thus put in force. Surely, if this chapter was put in force for one purpose, namely, for probate purposes, it would be put in force for all purposes and determined and constituted the rule of law by which the heirs therein provided for were determined; and under that act the plaintiff in error unquestionably inherited a life estate in the allotment of his deceased child, for such was given him under the plain and express provisions of Chapter 49.

Another expression in said opinion, is:

> "This Act of April 28, 1904, *supra*, put in force in the Indian Territory the laws of Arkansas, in certain classes of cases where certain tribal laws had theretofore controlled, but did not in any manner effect the provisions of the special act known as the Supplemental Creek Treaty, of June 30, 1902."

This is the very reverse of the decision of said Supreme Court in *Hawkins* v. *Stevens*, *supra*. It then continues:

> "To hold that it did would also in like effect hold that it would repeal all the restrictions upon alienation of Indian lands; the provisions for special U. S. courts; all tribal tax laws; all laws forbidding taxing of Indian lands, etc.;

indeed, very few, if any, U. S. laws would be left in force in the Indian Territory, for, as counsel contends, only such laws would be in force as had theretofore been put in force from the Statutes of Arkansas."

But again, this prediction of such misfortunes never came to pass, and said act was not capable of bringing about such disaster, as shown by the decision of said Supreme Court in *Taylor* v. *Parker et al.*, and especially *In re. Davis' Estate*, 32 Okla. 209, where said court, after the opinion in the case at bar, held:

"1. *Indians—Lands—Allotments—Statutory Provisions.*—The Act of Congress of April 28, 1904, c. 1824, 33 St. at L. 573, continuing and extending in their operation all the laws of Arkansas theretofore put in force in the Indian Territory, so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise, was not intended to and did not work a repeal of Section 15 of the Act of July 1, 1902, c. 1362, 32 St. at L. 642, providing that lands allotted to members and freedmen of the Chickasaw and Choctaw Nations should not be affected by any deed, debt, or obligation, of any character, contracted prior to the time at which said land might be alienated."

See also *Williams* v. *Johnson*, 32 Okla. 247, where the same judge rendered a decision contrary to this prediction.

Here the court openly recognizes that by said Act of April 28, 1904, all such former Statutes of Arkansas were put back in force in the Indian Territory and made applicable equally to the Indians and their estates the same as to other persons; but it held that the restrictions on alienation of such Indian allotments and the provisions of said treaties thus imposing the restrictions were not repealed by said act; but that said laws were made applicable to such allotments subject to these previous conditions on alienation. Practically to the same effect is the opinion of this court, rendered on the 6th of April, 1914, in *Franklin* v. *Lynch et al.*, 58 L. ed. 505, Point 1, where this court held:

> "*1.* The removal by the Act of April 21, 1904 (33 Stat. at L. 204, Chap. 1402), of all restrictions upon the alienation of lands of all allottees of the Five Civilized Tribes of Indians who are not of Indian blood, did not empower a white member of the Choctaw Tribe to sell before allotment."

This opinion then closes with this final statement:

> "We do not deem further consideration of this subject necessary. Undoubtedly the devolution of the land embraced in this controversy is controlled by Section 6 of the Supplemental Creek Treaty, *supra*, and such being the case, it is plainly apparent that the plaintiff, George Washington, the full-blood Seminole, father of Waitie Washington, a half-blood Creek, did not inherit any interest in his allotment, and, there-

fore, the judgment of the District Court of Hughes County should be affirmed."

Thus, after holding that the repugnancy between these two acts was largely a creature of imagination, which, if so, there could be no repugnancy at all, the decision closes by holding that the plaintiff in error was not an heir of his deceased son and could not inherit any estate or interest in his allotment, because he was a Seminole Indian, and for that reason came squarely within the provisos of said Section 6 of the Supplemental Creek Treaty. Said provisos alone constitute an irreconcilable repugnancy between said Section 6, which comprises Chapter 49 plus the provisos, and Chapter 49 without the provisos, as put back in force throughout Indian Territory, including the Creek Nation, by this Act of April 28, 1904. After the case at bar was decided, said state Supreme Court decided *Hawkins* v. *Stevens*, *Taylor* v. *Parker*, *In re. Davis' Estate*, hereinbefore cited; and held, that this Act of April 28, 1904, did become effectual as a law and continued said Arkansas Statutes. It was recognized and so held by the Circuit Court of Appeals, Eighth Circuit, on July 10, 1907 (which was before the death of Waitie Washington on the 3rd of November, 1907), in the case of *Morrison et al.* v. *Burnette et al.*, 154 Fed. 617. The suggestion is held out in this opinion that the effect of this Act of April 28, 1904, was simply to confer upon the United States courts *probate jurisdiction* alone. But

such jurisdiction was expressly conferred upon such courts in Section 31 of this Act of May 2nd, 1890. But that, of course, did not extend to these Indians, or their estates, but related simply to the estates of other people. Hence, the necessity of establishing a uniform system of laws throughout Indian Territory and make them applicable alike to all persons and estates, "whether Indian, freedman, or otherwise." The court will observe that this quoted expression is used twice in the second paragraph of said Act of April 28, 1904; *first*, as to the persons and estates in said Territory, and *second*, as to "the District Courts in said Territory in the settlement of all estates of decedents, the guardianships of minors, and incompetents, whether Indian, freedman, or otherwise." Thus, both provisions are emphasized and specifically designated by this phrase, "whether Indian, freedman, or otherwise." It is thus apparent that Congress intended that there should be no doubt whatever as to what persons and estates these Arkansas Statutes should apply when thus again put in force under said act. The fact that the phrase is repeated makes it conclusive that said courts were not only given jurisdiction over all such persons and estates, but that in such jurisdiction, their rights and interests should be determined alone by these Statutes of Arkansas thus put in force by the act itself and that they should extend to all persons and their estates regardless of whether they were Indian, freedman, or otherwise.

In *Hudson* v. *Ely et al.*, 36 Okla. 576, 129 Pac. 11, said State Supreme Court, on the 19th of November, 1912, after the decision at bar, point 1, held:

> "1. *Statutes—Implied Repeal—Statutes Covering Subject Matter.*—A statute revising the whole subject matter of former acts, containing in the main the provisions of the former acts, and evidently intended as a substitute for them, although it contains no express words to that effect, operates to repeal the former acts."

See same rule laid down by said court on October 21, 1913, in *Garnett et al.* v. *Goldman*, 39 Okla. 516, 135 Pac. 411.

And in *Williams et al.* v. *Johnson*, 32 Okla. 247, 122 Pac. 485, the same division of said Supreme Court, and the same learned judge who delivered the opinion in the case at bar, in just sixty-three days after delivering the opinion in the case at bar, held:

> "1. *Constitutional Law—Treaties With Indians—Amendment—Repeal.*—When Congress determines that the best interests of the Indian will be subserved by the abrogation, annulment, amendment, or repeal of a treaty agreement made with a tribe of Indians, it may, by subsequent act, make the necessary modification or amendment, and of the advisability, or expediency, of such change or alteration, Congress is the sole and exclusive judge. The question, being political and not judicial, is, therefore, not a proper subject for consideration by the courts.

2. *Same—Alienation of Lands—Repeal of Statute.*—The repeal of a law by implication is not favored by the courts, and will not be held to exist if there is any other reasonable construction or interpretation by which the conflicting acts may be sustained; but, where there is a hopeless and irreconcilable conflict between two Acts of Congress, the latter will prevail over the former. In this case the Act of Congress of April 21, 1904 (chapter 1402, 33 St. at L. 204), repeals by implication insofar as there is such conflict, the Act of Congress of July 1, 1902 (chapter 1362, 32 St. at L. 641)."

In support of this holding, the same learned judge cites the following cases: *Ladsworth* v. *Boysen*, 148 Fed. 771, 78 C. C. A. 437, from which quite an excerpt is quoted; *Lord* v. *Racehorse*, 163 U. S. 541, 41 L. ed 244, from which is pointed out that:

> "Mr. Justice WHITE, now Chief Justice WHITE, said in discussing this identical question: 'That a treaty may supersede a prior Act of Congress and an Act of Congress supersede a prior treaty, is elementary'—citing *Fong Yeu Ting* v. *U. S.*, 149 U. S. 697, 13 Sup. Ct. 1016, 37 L. ed. 905; the *Cherokee Tobacco* case, 11 Wall. 621, 20 L. ed. 227 (which is the same case we have relied upon in this brief and cited as authority at considerable length), and concerning which it is stated in this opinion:
>
> > 'The Supreme Court of the United States held that an Act of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. This is a very strong

case in support of the doctrine that a subsequent Act of Congress on the same subject takes precedence over a prior treaty agreement, and this doctrine obtains not alone to the so-called treaties between the government and the various Indian tribes, but with foreign nations as well.'

Case of *Thomas* v. *Gay*, 168 U. S. 264, 42 L. ed. 740, also cited and relied upon, and where it is there stated: 'The Supreme Court of the United States held that an Act of May 2nd, 1890, created in the Territory of Oklahoma, prevails over and against the provisions of a prior treaty between United States and the Osage Indians'; and as to *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, it further observed:

> 'The Supreme Court held that the power existed in Congress to abrogate the provisions of an Indian treaty, though presumably such power would be exercised only when circumstances arose which would not only justify the government in disregarding the stipulations of the treaty, but which demand, in the interest of the country and the Indians themselves, that it should be so.'

It then quotes further upon this same opinion, as follows:

> 'Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.'

The opinion then cites *Tiger* v. *Western Investment Co.*, 221 U. S. 268, 55 L. ed. 738, from which it quotes:

> 'Congress, in pursuance of the law and the established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indians shall cease'."

We believe the decision of that court in this *Williams-Johnson* case is correct; and it is gratifying to us that that court came to the same conclusion in that case as we have in the case at bar, and there relied upon, in part, the same cases we have heretofore cited as authority to sustain our views in this case. In that case the court first set out Sections 15, 16, 68, and 73 of the Choctaw Supplement of July 1, 1902, which shows the restrictions upon Choctaw allotments. It then set out that provision of the Act of Congress approved April 21, 1904, removing the restrictions "upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood," etc. It then observes:

> "It is apparent that there is a direct conflict between these two Acts of Congress, and the question therefore necessarily arises, Which act shall control? Or, rather, Has Congress the power to alter, amend, or modify, by a subsequent Act of Congress, the provisions of a treaty with the Five Civilized Tribes?"

It then held that Congress had such power and that said Act of April 21, 1904, repealed said respective sections of said Supplemental Choctaw and Chickasaw Agreement. But in the case at bar, this same court and learned judge held that said Act of April 28, 1904 (which was passed just seven days after the Act of April 21, 1904, and likewise affected the whole Five Civilized Tribes), did not repeal Section 6 of the Supplemental Creek Agreement, because not repugnant thereto. We are not able to reconcile these two decisions; for, to our mind, the Act of April 28, 1904, is as repugnant to said Section 6 of said Creek Supplement as said Act of April 21, 1904, is repugnant to Sections 15 and 16 of said Choctaw Supplement. By the decisions hereinbefore cited of said state Supreme Court, said Act of April 28, 1904, re-imposed all of the former Statutes of Arkansas, and, as therein held, made them applicable to all persons and estates in Indian Territory. Among these statutes was Chapter 49 of Arkansas. And, as before said, Section 6 of this Creek Supplement is nothing more or less than said Chapter 49 plus these provisos. It is therefore too evident for dispute that Chapter 49 plus the provisos would necessarily be repugnant to Chapter 49 less the provisos; and the repugnancy between the two is measured by the extent of the proviso. It therefore follows that the Act of April 28, 1904, repealed these provisos in Section 6 of this Creek Supplement, and left Chapter 49 from that time on

standing without modification, whatever. This would give the plaintiff in error either an ancestral estate or a life estate in the allotment of his deceased child. If it was a new acquisition, the plaintiff in error took a life estate only. If an ancestral estate and came to the son through the father, he would take the fee to the allotment. If it came to the son equally from the father and the mother, then the plaintiff in error would be entitled to one-half of said allotment in fee, as claimed and set forth in his answer filed in this case. In either event, the decisions of said state courts in the case at bar were clearly erroneous and should be reversed; and in considering the legal force and effect of said Chapter 49, in addition to said decisions of the Supreme Court of Arkansas, and others herein cited, as to the proper construction of that chapter, it should not be overlooked that this court likewise has already construed that statute in the case of *Mullen* v. *United States*, in which the same arose out of Section 22 of this same Choctaw Supplement of July 1, 1902, and where this court held that the heirs to such Indian allotments might, or might not, be members of said Indian tribes. So that if this be the true construction of said Chapter 49, the plaintiff in error was an heir to his deceased child and inherited an interest in his allotment. The same would be true under the federal decision in *Armstrong* v. *Wood*, 196 Fed. 137, where that court held that the provisos in said Section 6 of said Creek Supplement

never had any application to an actual allotment to a member of such tribe, but had reference only to the lands of the Creek Nation; and also under the decisions of said state Supreme Court herein cited, and especially the case of *Hawkins* v. *Stevens*, where the Creek husband allottee died in June, 1906, and left a non-Creek widow, who was thereby held to be entitled to dower in his Creek allotment, thereby giving her a life estate therein to the extent of her dower, which is provided for in Section 1 of said Chapter 49, and another Statute of Arkansas in said decision referred to.

Fourth Assignment of Error.

That said court erred in holding and deciding that Section 2 of the Act of Congress entitled, "An Act to Provide for Additional United States Judges in the Indian Territory, and for Other Purposes," approved April 28, 1904, did not repeal, by implication or otherwise, Section 6 of said Supplemental Creek Agreement.

In presenting the preceding assignments of error in this brief, we necessarily included and discussed this fourth assignment of error also, as we deemed them inseparable. In fact, we believe that the second, third, and fourth assignments might all have been included in one, but concluded that perhaps it would be better and, perhaps, safer to state them separately, but the discussion of one necessar-

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ily, to a large extent, included the others, and for this reason we shall not further discuss this fourth assignment, but treat it as already considered under the other assignments.

If our premises here be correct, then it must follow that the decisions of said state courts are erroneous and should be reversed. But, as an explanation for the length of this brief, we desire to say that the amount involved in the case hardly justifies this labor and expense; but, the decision of this case by this court will affect every other similar case in the Creek Nation and likewise in other tribes thus having exceptional statutes of descent, such as characterize said Section 6, and Section 2 of the Seminole Supplemental Agreement. Its importance, therefore, can readily be seen and its effect will be felt throughout all of said tribes, as this is the first time, to our knowledge, that this particular aspect of these treaties has been presented for a final determination.

We, therefore, respectfully submit that said state court decisions in the case at bar are erroneous, for the reasons we have assigned; and that the same should be reversed and remanded by this honorable court.

Respectfully submitted,

LEWIS C. LAWSON,
Counsel for Plaintiff in Error.

Holdenville, Okla., July 23, 1914.

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No. 58

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

In the

Supreme Court of the United States.

October Term, 1914.

GEORGE WASHINGTON, - - *Plaintiff in Error,*

vs.

CHARLES W. MILLER, - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Brief on Behalf of Defendant in Error.

NATHAN A. GIBSON,
Attorney for Defendant in Error.

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as aforesaid, there was drawn in question and necessarily decided Section 1 of the Fourteenth Amendment to the Constitution of the United States, which declares that, "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and that said decision and holding is repugnant to and in conflict with said section of said Fourteenth Amendment and deprives the plaintiff in error of his right, title, interest and estate in and to said lands, without due process of law, and denies the said plaintiff the equal protection of the laws, as made and provided in said section. (Plaintiff in Error's Assignment No. 1.).....80-88

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In the

SUPREME COURT OF THE UNITED STATES,

October Term, 1914.

No. 336.

GEORGE WASHINGTON, - - *Plaintiff in Error,*

vs.

CHARLES W. MILLER, - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement

The facts in this case, so far as they are necessary for the consideration of this court under the assignments of error, are as follows:

A suit to quiet title to the lands in controversy was filed in the District Court of Hughes County, Oklahoma, by Charles W. Miller, as plaintiff, against George Washington, Cissie Cosar and Lillie Cosar as defendants. An answer was filed by George

Washington, defendant, wherein he set up that the lands were allotted to Waitie Washington, enrolled as a full-blood Creek Indian, who died intestate and an infant about November 2, 1907, leaving surviving him, his mother, Cissie Cosar, a full-blood Creek Indian; the defendant, George Washington, a full-blood Seminole Indian; Lillie Cosar, a full-blood Creek Indian, a half sister on part of his mother; and Wadie, Willie and Lena Washington, half brothers and half sister on part of his father, all of whom are full-blood Seminoles. That Cissie Cosar, the mother, separated from defendant George Washington and took up with one Mack Cosar; that defendant, Washington, after said separation married Hepsey Washington, his present wife, a Seminole, and by her had three Seminole children, Wadie, Willie and Lena Washington living. That Waitie Washington at the time of his death was unmarried and left no issue; that the said lands were allotted to the said Waitie Washington as his proportional part of the lands of the Creek Nation on the final allotment.

Defendant, Washington, in his answer further alleged that Cissie Cosar, joined by Mack Cosar, by their joint deed attempted on July 16, 1909, to convey said lands to Frank L. Warren, and on the same day said instrument attempting to convey said lands was approved by the County Court of Hughes County, Oklahoma, and said instruments were duly placed of record. That Warren conveyed to one

W. J. Smith, and on December 21, 1909, Oscar S. Penny as administrator of estate of W. J. Smith, conveyed to First National Bank of Holdenville, Oklahoma, which later conveyed said lands back to said Warren. That said Warren and wife conveyed to Charles W. Miller, plaintiff herein, and grantee Miller, executed and recorded a mortgage on same to Union Central Life Insurance Company and L. U. Humphrey and L. L. Humphrey, of Independence, Kansas. That on April 28, 1911, the defendant, George Washington was induced by said Warren to make him a quit claim deed by representing to him that he had no interest in the said lands, and alleging that said deed was secured by misrepresentation and undue influence.

Defendant prayed that the Union Central Life Insurance Company, L. U. Humphrey and L. L. Humphrey, subsequent mortgagees, and Frank L. Warren, be made parties to the suit, and that he be decreed the owner, either of an undivided one-half interest in said lands, or to a life estate therein.

Thereupon the plaintiff Charles W. Miller filed his motion for judgment on the pleadings as against the defendant, George Washington, for the relief prayed for in the petition, for the reason that the allegations of the said answer affirmatively showed that the defendant, George Washington, had no interest in the premises and that plaintiff was entitled to relief sought against him. (Tr., p. 25.)

This motion for judgment on the pleadings was sustained by the District Court of Hughes County, Oklahoma, in its decree of June 26, 1911. (Tr., pp. 27-28.)

The cause was duly appealed by the said George Washington to the Supreme Court of Oklahoma, which said court affirmed the District Court of Hughes County, Oklahoma, in an opinion handed down January 9, 1912. (Tr., pp. 46, 47, 48, 49 and 50.) Petition for rehearing was denied and the cause was appealed to this court.

BRIEF *and* ARGUMENT

There are three questions presented for argument in the four assignments of error, the fourth being merged by counsel for plaintiff in error in the third, the argument in the brief of plaintiff in error having eliminated the fourth, as a separate assignment.

Inasmuch as the decision of the trial court was based on the point raised in the assignment of error listed as No. 3, by counsel for plaintiff in error, we have elected to discuss that at the outset.

As a decision on Assignment No. 2 is unnecessary if the court should affirm the Supreme Court of Oklahoma on the matters directly in its opinion, we have followed with Assignment No. 2 in its regular place following the matters directly decided by the court.

As we feel that the matters discussed in Assignment No. 1, as set out in brief of plaintiff in error, are not properly before this court and cannot be considered, we have placed their discussion last.

First Division

That the said court erred in holding and deciding that Section 6 of the Supplemental Creek Agreement, approved June 30th, 1902, was in force and

effect at the time the descent was cast in this case, *to-wit.*, November 3, 1907, and terms thereof controlled in the devolution of said estate. *(Plaintiff in Error's Assignment No. 3.)*

The section referred to being section six of the Supplemental Creek Treaty (32 Stat. 500), approved June 30, 1902, is as follows:

> "*Sec. 6.* The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), insofar as they provide for descent and distribution, according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in the Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

Counsel for plaintiff in error admits that the aforesaid section 6 was the law governing inheritance as far as non-citizens were concerned up to April 28, 1904, but contends that certain legislation enacted by Congress on that day repealed the said section 6. The Act of April 28, 1904, to which he refers, is known and entitled, "An Act Providing for Additional Judges in the Indian Territory and for

Other Purposes." It is in two sections and they are as follows:

"*Sec. 1.* That there shall be appointed by the President by and with the advice and consent of the Senate, four additional judges of the United States Court in the Indian Territory, one for the northern district, one for the western district, one for the central district, and one for the southern district. And said judges shall have all the authority and exercise all the powers, perform like duties, and receive the same salary as other judges of said court, and shall each serve for a term of four years from date of appointment, unless said offices are sooner abolished by law. Neither the additional judges, nor their successors in office, shall be members of the Court of Appeals for the Indian Territory, but they shall hold such courts, in their respective districts as may be directed by the Court of Appeals of the Indian Territory, or majority of the judges thereof in vacation: *Provided*, that none of said judges shall have power to appoint clerks of courts, United States Commissioners, or United States constables in said districts, and hereafter at least three terms of court shall be held in each year, at each place holding court in the Indian Territory, the times to be fixed in the manner now provided by law.

"*Sec. 2.* All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in

> said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, Freedmen or otherwise. That the sum of twenty thousand dollars is hereby appropriated out of any money in the treasury not otherwise appropriated, for the payment of salaries of the judges hereby authorized, the same to be immediately available."

Counsel for plaintiff in error seems to contend that the above act repealed all the law we had in the Indian Territory except that laid down in the Statutes of Arkansas that had previously been put in force. At least this is the only way we can interpret his many successive pages devoted to the question. Following is our theory of this act and its purpose, which we confess is the only one we have heard seriously advanced with reference thereto, during a continuous residence in the Indian Territory, through all the time the act was in force.

The first legislation pertaining to the courts in the Indian Territory, where the laws of Arkansas were generally put in force, was the Act of May 2, 1890 (26 Stat. 81). Section 30 of that act pertains to the courts and their jurisdiction, and closes with the following *proviso:*

> "*Provided, however*, that the judicial tribunals of the Indian Nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the county in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the

> laws of the State of Arkansas extended over and put in force in said Indian Territory by this act shall not apply."

Section 31 of the same act is the section that puts in force most of the Arkansas laws, chapter by chapter, including all the civil and criminal laws and also the chapters of administration and guardianship. This section closes with the following paragraph:

> "But nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national council where such laws are not contrary to the treaties and laws of the United States."

Under the foregoing provisions the several tribes continued to maintain their tribal courts for all purposes in matters between members of the tribe and in probate matters, that is to say, the tribal courts performed all the functions they had ever performed and the United States Courts only exercised their jurisdiction where non-citizens violated the laws or were in litigation, or where the dispute in civil matters was between a non-citizen and a member of a tribe. There were other sections in this act as well as in the Act of 1889, that

referred to the jurisdiction of courts, but they only emphasized the fact that the tribal courts were not molested where matters between members of the same tribe were involved.

While the chapters on administration and guardianship were placed in force in the Indian Territory, there was nothing that indicated that the United States Courts then established had the authority to enforce them. It was never claimed by any one that there was any probate authority in the United States Courts as to members of the tribes under these acts, until the statement appeared in the brief of counsel for plaintiff in error. On the other hand the claim was general and insistent that they had no probate authority whatever, that such authority was foreign to the jurisdiction of United States Courts, and they in fact had no probate jurisdiction over the estates of non-citizens, though they did exercise it in their cases.

This condition as to the jurisdiction of the various courts continued until the passage of the act popularly known as the first "Curtis Bill" (30 Stat. L. 495, June 28, 1898), which attempted to abolish all tribal courts in section 28 of said act. This section is as follows:

> "*Sec. 28.* That on the first day of July, 1898, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have authority whatever to do or perform any act theretofore authorized by any

law in connection with the said courts, or to receive any pay for same, and all civil and criminal causes then pending in any such court shall be transferred to the United States Court in said territory by filing with the clerk of the court the original papers in the suit; *Provided*, that this section shall not be in force as to the Chickasaw, Choctaw and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight."

But the provision did not become the law in all the nations. The various statutes passed about this time are very conflicting, and this self-same Curtis Bill contained conflicting provisions with reference to the various nations. It did become the law of the Creek and the Cherokee Nations as it was written and at the time specified. It did not become the law of the Seminole Nation, nor of the Choctaws or Chickasaws. The Chickasaws retained their probate jurisdiction thereafter, and also all jurisdiction of a criminal nature except homicide, embezzlement, bribery and embracery. This was the provision of the Atoka Agreement and was not appealed or invalidated until the passage of this Act of April 28, 1904, which is under discussion.

The reason these provisions of the Curtis Bill did not abolish tribal courts was because of the treaties with the Choctaws, Chickasaws and Seminoles.

The Chickasaw and Choctaw Treaty (Atoka Agreement) was proposed in the same act, being all of section 29 thereof.

The opening paragraph of said section 29, is as follows:

> "*Sec. 29.* That the agreement made by the Commission to the Five Civilized Tribes with commissions representing the Choctaw and Chickasaw Tribes of Indians on the twenty-third day of April, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the first day of December, eighteen hundred and ninety-eight, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; and the executives of said tribes are hereby authorized and directed to make public proclamation that said agreement shall be voted on at the next general election, or at any special election to be called by such executives for the purpose of voting on said agreement; and at the election held for such purpose all male members of each of said tribes qualified to vote under his tribal laws shall have the right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not; *Provided*, That no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States Court shall be permitted to vote at said election; *Provided further*, That the votes cast in both said tribes or nations shall be forthwith returned duly certified by the precinct officers

to the national secretaries of said tribes or nations, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and national secretary of the Choctaw Nation, the governor and national secretary of the Chickasaw Nation, and a member of the Commission to the Five Civilized Tribes, to be designated by the Chairman of said Commission; and said board shall meet without delay at Atoka, in the Indian Territory, and canvass and count said votes and make proclamation of the result; *and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement.*" (Our italics.)

There is further embraced in said section 29, much farther on in the section, the following paragraph:

"It is further agreed that the United States Courts now existing, or that may hereafter be created, in the Indian Territory, shall have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession or use of real estate, coal and asphalt in the territory occupied by the Choctaw and Chickasaw tribes; and of all persons charged with homicide, embezzlement, bribery and embracery, breaches or disturbances of the peace, and carrying weapons, hereafter committed in the territory of said tribe, without reference to race or citizenship of the person or persons charged with such crime; and any citizen or officer of the Choctaw or Chickasaw nations charged with such crime shall be tried

and, if convicted, punished as though he were a citizen or officer of the United States.

And sections sixteen hundred and thirty-six to sixteen hundred and forty-four, inclusive, entitled 'Embezzlement,' and section seventeen hundred and eleven to seventeen hundred and eighteen, inclusive, entitled 'Bribery and Embracery,' of Mansfield's Digest of the Laws of Arkansas, are hereby extended over and put in force in the Choctaw and Chickasaw nations; etc. * * *

It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a state to the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."

Under this provision the Chickasaw and Choctaw Courts continued to punish for all crimes except homicide, embezzlement, bribery and embracery and breaches of the peace, and continued to exercise all probate jurisdiction until the passage and approval of the Act of April 28, 1904.

These acts have been construed by the United States Court of Appeals for the Indian Territory, by the United States Circuit Court of Appeals for the Eighth Circuit and by the Supreme Court of the United States.

In *George* v. *Robb et al.*, 4 I. T. 61, 64 S. W. 615, the United States Court of Appeals for the Indian Territory, in a Creek case, sees fit to call attention, parenthetically, to the fact that tribal courts still had jurisdiction of the Chickasaws and Choctaws. Its language is as follows:

> "And by section 28 of the same act (Sec. 5718, Ind. Ter. An. St. 1899) it is provided that the courts of the Creek Nation, shall be abolished on and after October 1, 1898. Jurisdiction to hear and determine all civil suits was conferred upon the United States Courts after that date, and by the provisions of the section above cited, the laws of the Creek Nation could not be enforced." (The ratification of the Atoka Agreement, however, left the jurisdiction of the courts of the Choctaw and Chickasaw Nations unchanged until March 4, 1906.)

This opinion was handed down October 4, 1901, prior to the enactment of the Act of April 28, 1904, which took away the jurisdiction of the tribal courts, and the court therefore used the date originally intended for the closing of the tribal courts—March 4, 1906.

In *Hayes* v. *Barringer*, 168 Fed. 221, the United States Court of Appeals for the Eighth Circuit, says in its third syllabus:

"3. *Indians.—Choctaw Wills and Probate by Courts Effective Prior to 1906.*

Prior to March 4, 1906, the Chickasaw Indians had the right to dispose of their devisable property by wills made in accordance with the laws of the Chickasaws, the proper Chickasaw probate courts had jurisdiction to probate these wills, and its judgments are impervious to collateral attack."

In this case one Sarah Hayes St. John, a full-blood Chickasaw, in July, 1903, devised all her property to Ida Hayes and died. Her will was probated (after 1903) and an administrator of her estate was appointed by the tribal probate court of the Chickasaws.

The court, through Judge SANBORN, in the opinion, says:

"Prior to March 4, 1906, the Chickasaw Indians had the right to dispose of their devisable property by wills made in accordance with the laws of Chickasaw Nation; the county and probate court of that nation for Pontotoc County, in which the will here in question was probated, had jurisdiction to hear and allow such will; and the judgment of the probate of that will is not open to collateral attack. Act June 7, 1897, c. 3, 30 Stat. 83 (U. S. Comp. St. 1901, p. 1618); Act June 28, 1898, c. 517, 30 Stat. 495 (Curtis Act), 28, 29; Atoka Agreement, 30 Stat. 512; *In re. Poff's Guardianship*, (Ind. Ter.) 103 S. W. 765; *Gray* v. *Coffman*, Fed. Cas. No. 5,714; *Elliott* v. *Garvin*, (C. C. A., 8th Circuit) 166 Fed. 278; *Mehlin* v. *Ice*, 56 Fed. 12, 5 C. C. A. 403; *Cornells* v. *Shannon*,

63 Fed. 305, 306, 11 C. C. A. 465, 466; *Buster* v. *Wright*, 135 Fed. 947, 953, 68 C. C. A. 505."

This question has also been passed upon by the Supreme Court of the United States. In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 Law ed. 1041, the court in an opinion by Chief Justice FULLER, near the close of the opinion uses the following language:

> "The agreement with the Choctaw and Chickasaw tribes contained a provision continuing the tribal government, as modified, for the period of eight years from March 4, 1898," etc.

The provision of the act pertaining to the Seminoles which did become the law and which was thereafter enforced, a part of the first Seminole treaty (30 Stat. 567), is as follows:

> "The United States Courts now existing, or that may hereafter be created in the Indian Territory, shall have exclusive jurisdiction of all controversies growing out of the title, ownership, occupation or use of real estate owned by the Seminoles, and to try all persons charged with homicide, embezzlement, bribery and embracery hereafter committed in the Seminole country, without reference to race or citizenship of the persons charged with such crime, and any citizen or officer of said nation charged with any such crime, if convicted, shall be punished as if he were a citizen or officer of the United States, and the courts of said nation shall retain all the jurisdiction they now have

except as herein transferred to the Courts of the United States."

"When this agreement is ratified by the Seminole Nation and the United States the same shall serve to repeal all the provisions of the Act of Congress approved June 7th, eighteen hundred ninety-seven, in any manner affecting the proceedings of the general council of the Seminole Nation."

(Approved July 1, 1898.)

The force of the latter provision is apparent when it is borne in mind that the general council of the Seminole Nation was the Seminole court and was the same tribunal that tried all accused persons of the offenses of which they were charged. Under its supervision, its members, the band chiefs of the various bands, with others of the said membership as directed by the governor of the nation, constituted the probate courts of the nation. Under the acts as specified previously the Seminole courts continued until the passage of the Act of April 28, 1904, to exercise all their jurisdiction except in the cases of persons charged with homicide, embezzlement, bribery and embracery. Under their retained jurisdiction they continued until the said date to flog for larceny, and administer estates, and do all other things not taken from their jurisdiction by the treaty. At the time of the institution of this suit there was still pending in the County Court of Seminole County one, and probably more administrations, begun in the Seminole jurisdiction,

and transferred to the United States Court after the passage of the Act of April 28, 1904.

This then is our theory of the scope of the act of April 28, 1904, that it was passed for the purpose of taking from the tribal courts their criminal, civil and probate jurisdiction, and investing it in the United States District Courts; that its further object was to set at rest all doubts as to whether or not a United States Court could have probate power without a clear and explicit statutory provision; that it was passed to give additional facilities in the matter of extra judges, and when these judges were appointed to give them sufficient work, and give the people of the various court towns the added benefit of three terms per year.

We think it perfectly clear that the act in question only operated to give the above relief. The case of *Morrison* v. *Burnett*, 154 Fed. 621, rests the authority of United States Courts in probate matters where Indian estates are involved on this act.

Another reason why the passage of this act was necessary lay in the fact that all previous Acts of Congress, or most of them, had been passed with the provision that they should be effective "where not locally inapplicable." This act cured legislative gaps left down by these provisions.

It is probable that this act is the first enactment, is the first legislation, affirmative, which applied the common law to Indian estates, so far as

curtesy and dower are concerned. But these are all affirmative enactments. There is nowhere an intention to repeal anything. Further, an analysis of the second section of the act, which is the one in controversy, does not show an intention to enact anything in the way of new law, except in the matter of jurisdiction.

The section may be divided for the purposes of analysis into two parts, the first division being:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedmen or otherwise."

Now it seems clear to us that this first division could not be said to repeal any law, except that which excluded certain persons and estates from the operation of the laws of Arkansas and held them subject to Indian laws, making their misdemeanors and certain felonies punishable by the United States (Arkansas) laws, and bringing their estates within the scope of the Arkansas laws for settlement.

The second division comprises the balance of the section and is as follows:

> "and full and complete jurisdiction is hereby conferred upon the District Courts in said territory in the settlement of all estates of decedents, the guardianship of minors, and incompetents, whether Indian, freedmen or otherwise."

We feel that this latter division only confers on the United States District Courts a probate jurisdiction which they had not theretofore exercised. It also set at rest any doubt which there might be of a United States Court having such jurisdiction. By no stretch of imagination, to our mind, can this section be construed to repeal the plain terms of the Creek treaty. If it repealed the provision with reference to the inheriting of non-citizens, it also repealed every other provision of the Indian treaties not embodied in the Arkansas laws. It would in such an event repeal all the restrictions upon alienation of Indian lands, all the provisions for special United States Courts, all tribal tax laws, all laws forbidding taxation of Indian lands, in fact there would not be a United States statute left in force in the Indian Territory, and all the law that would have remained in the Indian Territory, under the argument of counsel for plaintiff in error, would be such law as had theretofore been put in force from the Statutes of Arkansas.

Counsel for plaintiff in error attempts to argue that this act is repugnant to section 6 of the Supplemental Treaty. We do not see why. We cannot see why there cannot be a statute putting all of certain laws of Arkansas in force, and another statute saying that no person not of Creek blood shall inherit the lands of the Creek Nation. The construction of statutes as we understand them, and particularly as applied to congressional acts, is this:

Where there are two statutes on the same subject, and no repealing clause, they should be reconciled as far as possible so as to give force and effect to both. If both can be given effect, then both should stand. More consideration might be given the argument of plaintiff in error, if this later statute had been one putting in force chapter 49 only. Even then we believe the law to be that both should stand if possible. But inasmuch as this is a general statute referring generally to all the laws of Arkansas, and not singling out the one of descent and distribution, we cannot see why any serious consideration should be given to the contention. Counsel for plaintiff in error argues at length upon repugnancy of statutes, and cites numbers of cases to support principles that are probably the law in connection with the matters decided therein, but which have no connection whatever with the law of this action.

The case of *Lamb* v. *Baker*, 27 Okla. 739, expounds the law applicable to this case. It holds that non-citizens can inherit if they are descendants of Creeks and have Creek blood, and conversely, if they are not such Creek descendants and have no Creek blood (and George Washington comes in either category) they cannot inherit.

Counsel for plaintiff in error relies to some extent on the case of *Armstrong* v. *Wood*, 195 Fed. 137, an opinion handed down by Judge CAMPBELL of the United States Court for the Eastern District

of Oklahoma, wherein he reached a different conclusion from the Supreme Court of Oklahoma in the case at bar, as to the effect and meaning of section 6 of the Supplemental Treaty and its *proviso*.

In our humble judgment the opinion of the learned judge in the case of *Armstrong* v. *Wood* is not the true theory of the section, and the decision of the Supreme Court of Oklahoma must be looked to for a correct exposition of the law.

The syllabus of said decision to which we object and which is at variance with the holding of the Supreme Court of Oklahoma in this case and also at variance with the holdings of the Supreme Court in *Lamb* v. *Baker*, 27 Okla. 739, 117 Pac. 189, and *Hughes Land Company* v. *Bailey*, 30 Okla. 194, 120 Pac. 290, is as follows:

> "*Indians — Land — Descent of Lands of Deceased Allottee — Construction of Creek Agreement.*
>
> In section six of the Supplemental Creek Agreement (Act June 30, 1902, c. 1323, 32 Stat. 501) which provides that the descent and distribution of land and money provided for by the Act of March 3, 1901, c. 676, 31 Stat. 861, shall be in accordance with sections 2522-2545, Mansf. Dig. (sections 1820-1843 Ind. Ter. Anno. St. 1899) then in force in the Indian Territory, instead of in accordance with the laws of the Creek Nation as provided in such act, '*Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation,' the proviso

was intended to apply only to unallotted lands, which alone were 'lands of the Creek Nation,' and to govern the descent or distribution of such lands among the heirs of members of the tribe entitled to share therein, but who died without having received their allotments, and does not apply to lands of an allottee who died after receiving his or her allotment, which pass by inheritance as the individual property of the allottee under the provisions of said Arkansas Statute."

The various sections of the treaties involved in the interpretation of this descent and which are discussed in this opinion and the ones holding a contrary view are as follows:

Sections three, six, seven and twenty-eight of the Original Creek Treaty (31 Stat. L. 861).

"*Allotment of Lands — Appraised Value.*

3. *All lands of said tribe* (our italics), as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give to each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of lands, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands for less than such standard value may, at any time, select other

lands which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

If any citizen select lands, the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid."

"*Allotments Previously Made, Confirmed.*

6. All allotments made to Creek citizens by said Commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and *all things else* (our italics), be governed by the provisions of this agreement; and said Com-

mission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said Commission."

"*Allotments Inalienable and Non-taxable—Descent of Homesteads.*

7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no

such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, *the lands shall descend to his heirs* (our italics), according to the laws of descent and distribution of the Creek Nation, free from such limitation."

"*Rolls of Citizenship — Additions to Rolls — Allotments to Heirs.*

28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the Protection of the People of the Indian Territory, and for Other Purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date,

the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons."

It will thus be seen that the Sec. 6, of the Supplemental Treaty under discussion is the only place where the lands to be inherited are designated as the "lands of the Creek Nation," but section six of Supplemental Agreement shows by its terms that it refers to "the provisions of the Act of Congress approved March 1, 1901, in so far as *they* (our italics) provide for descent and distribution," etc. Why was this plural used if only Sec. 28 was intended? We believe that the antecedent of "they" is every provision of the original agreement which refers to lands that might be inherited. We respectfully call attention to the fact that the learned judge overlooks sections six and seven when he says in the opinion referring to Sec. 28: "This was the only provision in the original agreement providing for inheritance of lands of the Creek Nation," and also that the language "lands of Creek Nation" is used in none of the sections of the Original Creek Agreement.

These sections as to the lands they intend to embrace have been construed by the Supreme Court of Oklahoma in *DeGraffenried* v. *Iowa Land & Trust Co.*, 20 Okla. 687, 95 Pac. 624. In an opinion handed down April 13, 1908, discussing these sections, the court says:

> "*Sec. 5.* That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottees died before the same became effective shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, the provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of approval of this act.
>
> Having thus determined that at the time of her death Castella Brown was seized of an equitable estate in fee to the lands in question, which, upon the execution and delivery of

the patent thereto after her death, ripened into an absolute estate in fee for the benefit of her heirs, let us next determine what law of descent and distribution is to determine the devolution of this allotment. It is contended by plaintiff in error, Creek Land & Improvement Company, that at the time of her death, June 7, 1902, 'the Arkansas Statute of Descent and Distribution, as embraced in chapter 49 of Mansfield's Digest (Ind. Ter. Ann. St. 1899, c. 21), and interpreted by the decision of the Supreme Court of Arkansas, was in force in the Creek Nation of the Indian Territory, and controlled the descent and devolution of the title to the property involved in this controversy.' With this contention we cannot agree. We think it sufficient to say that if these laws were ever applicable to the devolution of real property in the Creek Nation, they were repealed by implication by sections 6, 7 and 28 of the Act of March 1, 1901, called the 'Original Agreement.' As stated, this agreement was ratified May 25, 1901. The report of the Dawes Commission shows that from April 1, 1899, the date of the opening of the allotment office at Muskogee, up to June 30, 1901, 10,617 persons had appeared before it, and made application to select allotments. Of this number 9,557 received preliminary allotments of 160 acres and 1,060 made partial selection, covering in all 1,626,917 acres; section 6 of that act confirmed these allotments, and of necessity that many enrollments, and provided that they ' * * * shall, as to appraisement and all things else (which includes as to how they shall go on descent cast) be governed by the provisions of this agreement; and said Commission shall con-

tinue (not go behind) the work of allotment of the Creek lands to citizens of the tribe as heretofore, conforming to provisions herein. * * * ' This fixed the status of those allotments, including that of Castella Brown. Then as if to dispose of the whole subject of the descent of all allotments which had been made or would be made thereunder before descent cast, the agreement provides:

> '*Sec. 7.* Land allotted to a citizen hereunder (which includes that of Castella Brown) shall not in any manner whatsoever or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior. * * * (Limitation.) Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years (another) for which he shall have a separate deed, conditioned as above: *Provided*, * * * the homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no issue (Castella Brown had none) then he may dispose of his homestead by will (she made none) free from limitation herein (the last above) imposed, and if this be not done (no will

made) the land (What land? The homestead? No, or it would have said so. What lands are we talking about? Lands allotted to citizens hereunder — the whole allotment.) shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.'

What limitation? The last above on the homestead. Hence, as the lands in controversy were 'lands allotted' within the purview of the first words of this section they fell squarely within it, and their devolution is governed according to the laws of descent and distribution of the Creek Nation in force at the time of the death of Castella Brown.

But there was a vast number of citizens of the Creek Nation who were entitled to be enrolled when the land office opened April 1, 1899, but who, up to the time of making this agreement had not been enrolled, several of whom had died, and others who might die before receiving their allotments. Accordingly it was provided in the same agreement:

'*Sec. 28.* All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be (not those who had been) enrolled under (section 21 of the Curtis Bill) shall be placed upon the rolls to be made (the names already enrolled were to stand) by said Commission under said Act of Congress, and if any such citizen (*i. e.*, one entitled to enrollment on April 1, 1899) has died since that time, or may hereafter die, before receiving his allotment of land and distributive share

> of all of the funds of the tribe, the lands, and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.'

In short, sections 6 and 7 of this agreement fix the descent of the allotment (both surplus and homestead) in cases where the allottee receives his allotment before he dies, and section 28 fixes it in cases where he dies before receiving his allotment. In either case it was intended to 'descend to his heirs according to the laws of descent and distribution of the Creek Nation.' This, we think, is a literal construction of these sections, as was intended. 'The land' referred to in section 7, and 'the lands' referred to in section 28, mean one and the same thing, and both have reference to the entire allotment. This meaning must be given to 'the land' referred to in section 7, in order to carry out the intention of Congress. To confine it as simply referring to the homestead would convict Congress of a grave oversight, or as intending an absurdity, in that under both statutes the homestead would descend under the laws of descent and distribution of the Creek Nation. Under section 28 the surplus would also so descend, while under section 7 the surplus would descend under the laws of descent and distribution of Arkansas, as set forth in chapter 49 of Mansfield's Digest (Ind. Ter. Ann. St. 1899, c. 21). This would create endless confusion, and hence we will not attribute to Congress any such intention. Black on Interpretation of Laws (section 30) says:

> 'Every statute is construed with reference to its intended scope and the purpose of the Legislature in enacting it; and when the language is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute.'
>
> The scheme was a complete provision for the devolution of real property taken or to be taken in allotment under the terms of this agreement, and therefore repealed chapter 49 of Mansfield's Dig. (Ind. Ter. Ann. St. 1899, c. 21), if the same was ever in force in the Creek Nation; but on this we express no opinion."

The court here intimates that the Arkansas law of descent and distribution had never, prior to the passage of section 6 of the Supplemental Agreement, been in force in the Creek Nation. We cannot argue this phase, because of consideration for the time and patience of the court (and it would make no difference here), feeling that a full discussion of this phase will fully dispose of the matter.

The court will notice by an inspection of the entire Supplemental Agreement that where specific sections are amended, the method pursued is as follows (an instance):

> "2. Section 2 of the agreement ratified by Act of Congress approved March 1, 1901 (31 Stat. L. 861), is amended and as so amended is enacted to read as follows:"

And where new and complete legislation is intended a new and complete section is put in without the amending paragraph. Section six under discussion comes under the latter class. If the Congress and the Creek Commissioners had intended to affect only the lands referred to by the Court in *Armstrong* v. *Wood*, they would have said:

> "Sec. 28, of the agreement ratified by said Act of March 1, 1901, is amended and as so amended is re-enacted to read as follows:"

Then would follow the original section 28, except where it was specified therein that lands should descend in accordance with the laws of the Creek Nation, would be inserted the provision that they should descend in accordance with chapter 49 of Mansfield's Digest, with the Creek limitation.

Congress and the Creek Commissioners, however, put in a complete new section which covers all lands to be inherited. Note the language:

> "the descent and distribution of *land and money* (our italics) provided for by said act shall be in accordance with chapter 49," etc.

Then follows the proviso excluding non-citizens.

We feel sure that this proviso was intended merely to limit the foregoing language of section six. Nowhere in the history of this Creek allotment legislation had these lands, prior to Sec. 6, been referred to as lands of the Creek Nation. This proviso was undoubtedly intended to limit the persons

to whom the "land and money provided for by said act" should pass.

A proviso must be construed with reference to the subject matter of the section of which it forms a part, unless there is a manifest legislative intention that it should limit the operation of other sections of the act.

—*Boston Safe Deposit & T. Co.* v. *Hundson*, 15 C. C. A. 651, 68 Fed. 760;

United States v. *32 Packages Spirituous Liquors*, 65 Fed. 983;

Chattanooga R. & C. R. Co. v. *Evens*, 14 C. C. A. 116, 66 Fed. 814;

In re. Matthews, 109 Fed. 614;

McRea v. *Holcomb*, 46 Ark. 306;

Bragg v. *Clark*, 50 Ala. 363;

Black Con. & Interp. Laws, p. 275;

2 Sutherland Stat. Con., Sec. 352;

Counsel for plaintiff in error has used a great many pages of his brief to sustain the theory that his client would be entitled to a life estate in the lands, notwithstanding the provisions of section six in controversy. This on the theory that the lands are new acquisitions (the ground covered by the second assignment), and that a life estate is not inconsistent with the inheritance by the heirs.

We feel that the learned counsel has fallen into error in this: That he does not distinguish the nature of the estate acquired under the statute; that he confuses one who takes by operation of the com-

mon law, with one who takes as an heir under the statute.

The distinction as we understand it is that the one is a lien created by law on the property of married persons at the time of the marriage, or afterward if later acquired, and the other occurs by virtue of statutes of descent and distribution and is subject to administration and payment of debts.

Dower and curtesy are estates of the first class and all other estates of an inheritance from an intestate are of the second class.

In *Hill's Adm'rs* v. *Mitchell*, 5 Ark. 618, the court said:

> "Distribution and dower are two separate and distinct things. One is a lien created by law on property of the husband at the time of the marriage, which necessarily takes precedence over all other subsequent accruing rights, and attaches to the specific property, and is carved out of it. Distribution occurs after administration and the payment of debts, and the estate is then divided between the heirs and legatees. The widow is not entitled to any portion or distributive share after her dower has been allotted to her; for all that goes to the heirs or legatees and in payment of debts, and the administrator is bound to distribute the residue in his hands. We have no statute giving her any portion of the personal estate as a distributive share, and that part of the common law which is in force here allows her no such interest in the personal effects of her husband."

Assuming for the purposes of this argument that the allotment of Waitie Washington was a new acquisition, without in any way conceding that theory, in what better position would plaintiff in error find himself?

This is not an estate of dower or curtesy and we must therefore look to the statutes of descent and distribution of the State of Arkansas in force in the Indian Territory to see how he would take. The proviso in section six bars all but Creek citizens and their Creek descendants from inheriting the lands. Does a father who takes a life estate under the Arkansas statute in a new acquisition *inherit* the said estate or take it otherwise?

> "To 'inherit' is to take as an heir at law by descent or distribution."
>
> —*Warren* v. *Prescott*, 24 Atl. 948, 84 Me. 483, 17 L. R. A. 435;
>
> *Lyon* v. *Lyon*, 88 Me. 395, 34 Atl. 180.

Who then are heirs or heirs at law? these being barred from any interest in the said lands.

By the word "heirs" is properly meant those persons upon whom the law casts the real estate immediately upon the death of the intestate.

> —*Dakes* v. *Faulk*, 37 S. C. 255, 34 Am. St. Rep. 745;
>
> *Lyons* v. *Yerex*, 100 Mich. 214, 43 Am. St. Rep. 452;
>
> *In re. Estate Mary Jane Donohue*, 36 Cal. 329;

Lincoln v. *Perry*, 4 L. R. S. (Old Series) 215;

Anderson v. *Groesbeck et al.*, 55 Pac. (Colo.) 1086;

Hochstein v. *Berghouser*, 56 Pac. (Colo.) 547;

Kelley v. *Vigas*, 112 Ill. 242, 54 Am. Rep. 235;

Dodge's Appeal, 106 Penn. St. 216, 51 Am. Rep. 519;

Richards v. *Miller*, 62 Ill. 417.

The estate claimed for plaintiff in error, George Washington, is a life estate by virtue of section 2531 of Mansfield's Digest of the Statutes of Arkansas. It is an interest in real estate conferred by the statute, a title which could only be acquired after an administration and payment of debts under Arkansas laws. Under all of the above decisions such a person would be an "heir" and would "inherit" the property. The plaintiff in error in this case comes clearly within the prohibited class. He is in a sense an alien and as such is barred under the letter of section six.

In *Kelley* v. *Vigas*, *supra*, the court said:

> "Reference must be had to the statute to ascertain who are the 'heirs at law' of the testator and when that is done the rule seems to be that the statute also determines the quantity the heir shall take. As for instance in *Richards* v. *Miller*, *supra*, the devise was to the 'heirs at law' of the testatrix, and by the stat-

ute it was ascertained her husband was one of her heirs at law, and by the same statute he took one-half of the estate to the exclusion of the collateral heirs, as in case of intestacy and it was so decreed."

In this case, as in many of the others above cited, the court makes the distinction between the curtesy estate and the statutory estate of one-half and holds in the latter case the husband an heir. In our case a curtesy estate is not in consideration, for the kinship involved is not that of husband and wife, but of parent and child, and is purely statutory. The father would be designated as an heir, and would be in the excluded class.

Counsel for plaintiff in error also argues at length in the face of the holding to the contrary that said section 6 was a general act and not a special act. We feel that it is hardly necessary to give space to a reply to this. It can be seen at a glance and by its nature that it is a special act referring to the Creeks alone out of all the Five Civilized Tribes. The Act of April 28, 1904, is a general act governing all the tribes and all the whites and other people of the Indian Territory.

Second Division

That the said court erred in holding that under the fact presented in the record and proceedings in this case the plaintiff in error, George Washington, did not inherit any estate in and to the said allotment of the said Waitie Washington, deceased. *(Plaintiff in Error's Assignment No. 2.)*

Under the second assignment of error, which is general in its terms, counsel for plaintiff in error has elected to discuss the doctrine of ancestral estates and new acquisitions. This question is not properly in this case as it was not discussed in the opinion of the Supreme Court of Oklahoma.

The questions briefed have been decided by the United States Circuit Court of Appeals for the Eighth Circuit,

—*Shulthis* v. *McDougal*, 170 Fed. 529,

and by the Supreme Court of Oklahoma,

—*Pigeon* v. *Buck*, 38 Okla. 101, 131 Pac. 1083;
McDougal v. *McKay et al.*, No. 6372 (not yet reported).

(See Appendix C, p. 15, for last opinion.)

In all of these decisions the courts have held these estates to be ancestral and we assume counsel for plaintiff in error has briefed this for the reason that he cannot prevail under these decisions, whatever may be the opinion of the court on the ques-

tion decided by the Supreme Court of Oklahoma in the present case. While not strictly in this case, in as much as counsel for plaintiff in error has seen fit to brief it, we will present our theory of this question as represented in the above decisions. We had not apprehended that this question would be briefed as we regarded the matter fully closed by the decision of *Pigeon* v. *Buck, supra.*

On the question of the merits of the decision we think the decision of *Shulthis* v. *McDougal, supra,* is its own best argument and we therefore include the decision in full, so far as it pertains to the question under discussion:

> "Amidon, *District Judge.* This is a suit in equity brought by the appellant to determine conflicting rights to a parcel of real property situated in Oklahoma. While the cause was pending, George Franklin Berryhill was permitted to file a petition in intervention therein and make common cause with the complainant. The decree below dismissed the bill upon the merits. The case can best be presented by unfolding the facts and the law together.
>
> Andrew J. Berryhill was the son of George Franklin Berryhill, a member of the Creek Nation of the mixed-blood, and Clementine Berryhill, his wife, a non-citizen of that tribe. He was born on the 6th day of May, 1901, and died in the month of November of that year, leaving no brothers or sister surviving him. At no time during his life was he entitled to enrollment as a member of the tribe, or to an allotment of its property. After his death, by

the Supplemental Agreement entered into between the Commission of the Five Civilized Tribes, and Commissioners of the Creek Nation (Act June 30, 1902, c. 1323, 32 Stat. 501), proclaimed by the President August 8, 1902, it was provided in section 7, as follows:

> 'All children born to those citizens who are entitled to enrollment under previous acts, subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission.'

Andrew J. Berryhill met precisely the conditions of this agreement. He died, however, before the agreement was entered into, as already stated. But the agreement further made express provision for such a contingency in section 7, as follows:

> 'And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands, and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs as herein provided, and be allotted and distributed to them.'

The phrase 'as herein provided,' refers to chapter 49 of Mansfield's Digest of the Statutes of Arkansas, which deals with the subject of heirship and descent.

The word 'descend' is, of course, inapplicable to the actual contingency provided for by the statute, because that contingency contemplated the death of the child before he had actually become seized of any interest in the land. The word 'descend' is a word of art, and indi-

cates the transference of property by inheritance. If any significance is to be given to it as used in this section, it must be held that the intent of the parties to the agreement was that the land should pass to the same persons and in the same proportions as it would have passed if the child had died seized of it. Any other construction simply obliterates this word, and makes the land pass to the parties who are heirs directly by allotment from the tribe. The statute itself not only declares that it shall 'descend,' but also declares that it shall be 'allotted and distributed,' to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the agreement.

This construction receives further support by the general scheme which the federal government and the Creek Nation formed for the disposition of the tribal property. The first requisite for the partition of the tribal estate in severalty among its members was to ascertain and legally establish who were members of the tribe. By reason of the many intermarriages between members of the tribe and members of the white and negro races, and by reason of the fraudulent claims to membership, the ascertainment of the particular persons who were in fact entitled to such membership proved a much more difficult task than was at first anticipated. The Commission was empowered and directed to prepare such a roll. This work not only required much investigation on its part, but resulted in voluminous litigation. Instead of being a work of months, it proved to be a work of years. In the meantime, however, the membership of the tribe was constantly undergoing change by birth and death. In order to

provide for all members of the tribe who were born subsequent to the beginning of the enrollment, the date of right to enrollment was twice set forward, the statute last quoted fixing the latest date. By reason of these facts, when the roll was completed, it contained more names than were members in being. The roll, however, furnished the basis for the division of the tribal estate. Every person whose name was entered on the roll was entitled to an equal proportion of the tribal land and funds; but by reason of the fact that before actual distribution could be made, and even while the enrollment was in progess, some persons whose names were on the roll would die, the statute made provision for the disposition of the share of tribal property which would go to them if living. Such a provision was necessary. Otherwise there would have been a portion of the tribal property undistributed. It was never the intent, however, either of the tribe or the Federal government, to grant to parties having a kinsman who had died before the actual making of the allotment additional lands as a bounty. These kinsmen got all their right to additional lands under and through the enrolled member who had died. Whether the ancestor was actually seized of the property or not in his lifetime, was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance.

Congress itself has construed this statute. Section 5 of the act (Act April 26, 1906, c. 1876, 34 Stat. 138) provides:

> 'That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein, shall inure to and vest in his heirs; and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life; and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect.'

Here is an express declaration by Congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent.

We must, therefore, look to chapter 49 of the Arkansas statute both to ascertain who the heirs are, and what estate they shall take in the property. That statute does not treat of the subject of heirship independently, but combines that subject with the estate to pass by inheritance. Sub-section 2 of section 2522 provides as to general estate, both personal and real, of a person dying intestate, and having no children, that it shall go to the father. This sec-

tion, however, is to be read in connection with section 2531, which deals with the subject of the devolution of property when there is no heir of the blood to whom it can descend. Under this statute, if the deceased person came by the estate from his father, it is to go to the father, and if he came by it from his mother, it goes to the mother. The statute then proceeds:

> 'But if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act.'

This statute makes provision for all possible acquisitions of real property for the civilized white community whose estates it was intended to govern. Among the people of Arkansas there was no way of acquiring land except by grant, gift or inheritance. This was true even of lands acquired from the federal government under the public land laws. The patentee of such lands was always required to purchase the same either by residence and improvement, or the payment of a purchase price, or by these elements combined. It needs but a moment's thought to see that, when this statute was applied to the lands of the Creek Nation, it was applied to a subject-matter entirely different from that which was in the mind of the Legislature of Arkansas. The lands of that tribe fit into neither of the classes mentioned in the statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to

proceed by analogy only. The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members. From the time they took up their residence west of the Mississippi, the constitutions of the Five Nations provided that their land should remain 'common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them.' The term 'improvements,' as here used, meant not only betterments, but occupancy. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 210, 15 Sup. Ct. 55, 39 L. ed. 120. These 'improvements' passed from father to son, and were the subject of sale, with the single restriction that they should not be sold to the United States, individual states, or to individual citizens thereof. Under such regulation the members of the Creek Nation had been in possession of homes on their tribal lands for more than half a century. The portion of their lands which were not occupied in severalty, as well as the tribal funds, were treated as belonging to the members, and all income derived therefrom was distributed among them per capita. While the legal title to the tribal property belonged to the tribe as a political society,

the beneficial use of the same had at all times belonged to the members in severalty. It was to such a condition of life and property as this that the plan of allotment here involved was to be applied. Its controlling principle is a clear recognition that each member of the tribe, by virtue of his membership, was entitled to an equal share in all the tribal property. To carry out the scheme, the law first proceeds on the one hand to ascertain the membership of the tribe, and on the other the actual present value of its property, and then directs that the tribal property be divided per capita so that each member shall receive an equal share thereof, according to its true value. The right to such a share is not created by the statutes, but is simply recognized and enforced by them. The several agreements and Acts of Congress are not concerned with the legal title, but go back to the actual beneficial rights of property as they had always existed in Indian Territory. They require allotments to be made so as to save to each member his improvements, including his right of occupancy. While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to that property. The act by which the distribution is made is spoken of not as a grant, but as an allotment. We are not departing from the well-established doctrine of the Supreme Court that the lands of these Indians belong to them as a political society and not to the individual members. *Cherokee Trust Funds*, 117 U. S. 288, 308, 6 Sup. Ct. 718, 29 L. ed. 880; *Delaware Indians* v. *Cherokee Indians*, 193 U. S. 127, 24 Sup. Ct. 342, 48 L. ed. 646. So long as the tribal relations continued, a member had

no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents, as members of the tribe. His father was the only parent through whom he derived his right, and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally. From this premise it necessarily follows that George Franklin Berryhill succeeded to the entire estate of the property in question.

We next pass to the rights of the parties to this controversy under the conveyances from George Franklin Berryhill. On June 5, 1906, he and his wife executed a warranty deed

of the property to Edmund and Perry McKay in consideration of the sum of $2,000. It is now contended that this deed was void because at the time of its execution the grantor was without legal capacity to make such a conveyance. It is conceded that George Franklin Berryhill had only such power to dispose of the lands in question as was granted to him by the Act of Congress. Both parties base their right upon section 22 of the act approved April 26, 1906, which reads as follows:

> 'That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe * * * may sell and convey the lands inherited from such decedent.'

George Franklin Berryhill and appellant Shulthis make the same argument upon this statute that they did upon section 7, above quoted. It is urged that the land in question is not 'inherited' land. For reasons already explained, that contention, while technically right, is substantially wrong. The scheme of the statute clearly indicates that the land was to be regarded the same as if it had been inherited. No sound reason can be adduced for treating these lands otherwise than they would have been treated if Andrew J. Berryhill had survived long enough to receive the allotment. This interpretation is further supported by the provision of the several acts dealing with these allotments. Every member of the tribe was allotted a share in the tribal lands. Such allotment is repeatedly spoken of in the act as his

> 'homestead.' To protect this homestead, it was made inalienable for the term of five years. The reasons for making it inalienable did not apply to lands obtained by inheritance, and for that reason the statute last quoted was passed granting power to convey the same. The lands here in question fall under the same policy as lands obtained by inheritance, and the statute should be held to apply thereto. Berryhill, therefore, had power to make the deed to the McKays." (The remainder of the opinion pertains to other matters and is omitted.)

We will not attempt to add anything to the argument as made in the scholarly opinion written by the learned justice in that case. We believe it to be the acme of clear, sound logic, and that in this opinion so much was said in its support that every argument that might be advanced against the theory was successfully met.

The Shulthis Case a Rule of Property.

Since the delivery of that opinion in May, 1909, it has been uniformly followed by the Courts of Oklahoma, Supreme, District and Probate.

The Supreme Court of Oklahoma in *Pigeon* v. *Buck*, *supra*, held it to be a rule of property in this jurisdiction. Here is the complete opinion:

> "TURNER, J. On September 13, 1910, plaintiffs in error, Lena Pigeon, Jimmie Larney, Joseph Pigeon and Jakeman Pigeon, the two last named minors, by John Pusley, their

guardian, sued in the District Court of Hughes County, the defendants in error, William Buck, Willie Harjo, John Pigeon and Mate Pigeon, to clear their title.

The petition substantially states that Lowiney Harjo, a full-blood citizen of the Creek Nation and duly enrolled as such, on July 12, 1905, after receiving her certificate and patents thereto, died intestate, seized of her allotment (describing it) in the Creek Nation; that she left no child or children or their decendants her surviving, leaving her surviving plaintiffs, Lena Pigeon, Jimmie Larney, Joseph Pigeon and Jakeman Pigeon and her father and mother, John Pigeon and Mate Pigeon, also her husband, Willie Harjo, a full-blood citizen of the Creek Nation and duly enrolled as such; that thereafter the father and mother and the husband of deceased conveyed said land by warranty deed to the defendant, William Buck, which was duly approved by the County Court of Hughes County and filed for record; that the plaintiffs, brothers and sister of deceased, are her sole heirs, and as such entitled to inherit the property, because they say the same was a new acquisition; and prayed that the court so adjudge and decree and clear their title of the deeds made by the father and mother to said Buck. To the judgment of the court sustaining a demurrer to their petition, plaintiffs bring the case here.

Both sides agree that the devolution of this allotment is governed by chapter 49 of Mansfield's Digest of the Statute of Arkansas, and particularly sub-section 2 of section 2522, construed in connection with section 2531. Said sub-section reads: 'If there be no children,

then to the father, then to the mother; if no mother, then to the brothers and sisters or their descendants, in equal parts.'

And section 2531: 'In cases where the intestate shall die without descendants, if the estate comes by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided.'

That the land in question was not a new acquisition, and pursuant to these sections, when construed together, passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal*, 170 Fed. 529, 95 C. C. A. 615. There Andrew J. Berryhill, son of George Franklin Berryhill, a member of the Creek Nation of mixed blood, and Clementine Berryhill, his wife, a non-citizen of that tribe, died seized of an allotment. In determining who took the estate, the court construed these two sections together and held the person to be George Franklin Berryhill, the father of the deceased, and in passing said: ' * * * But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its prop-

erty was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme, it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by the act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership to the tribe. It was his birthright. It came to him by the blood of his tribal parent, and not by purchase. In applying the Arkansas statute, we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands, not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right, and to his father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally.'

Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there. (*De Walt* v. *Cline et al.*, 128 Pac. 121; *MaHarry* v. *Eatman*, 29 Okla. 46, 116 Pac. 935; *Duff et al.* v. *Keaton et al.*, 33 Okla. 92, 124 Pac. 201) we hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, his estate passed in equal moieties, and that plaintiffs in error, plaintiffs below, have no interest therein. For that reason the court did not err in sustaining the demurrer to their petition."

It is our contention on this phase of the case that the principle announced in the case of *Shulthis* v. *McDougal, supra*, has become a fixed rule of property in Oklahoma. If such it be and titles have been acquired on the strength of this condition, then this judicial construction should not be disturbed.

We believe the reasoning of the *Shulthis-McDougal* case is sound, but regardless of whether it is sound or not it has been followed by the state Supreme Court of Oklahoma. It was followed in the case of *Rentie* v. *McCoy*, 128 Pac. 244. This was a case finally decided by the Supreme Court in the month of November, 1912, and was held in that case that the father and mother inherited the allotment of their dead child to the exclusion of collateral kindred, and cited the case of *Shulthis* v. *McDougal*, 170 Fed. 529. There was no appeal to the Supreme Court of the United States in the case of *Rentie* v. *McCoy, supra.* Since the decision of said case of *Rentie* v. *McCoy, supra*, the Supreme Court of Oklahoma has adhered to the principle of the *Shulthis-McDougal* case continuously.

—*Pigeon* v. *Buck*, 131 Pac. 1083;

Iowa Land & Trust Co. v. *Dawson*, No. 2770 (not yet officially reported);

Gillum v. *Anglin*, No. ..... (not yet officially reported);

McDougal v. *McKay et al.*, decided August 25, 1914 (not yet officially reported)

(See Appendix C, p. 15, for last opinion.)

In all the above cases our court passed squarely upon the question involved in the *Shulthis-McDougal* case. Some lawyers in Oklahoma have made a desparate effort to procure the reversal of the *Shulthis-McDougal* case, and concentrated all their forces in the case of *McDougal* v. *McKay et al., supra.* Their contention was that the case of *Pigeon* v. *Buck*, and other cases, were wrong and should not be followed. The court, however, refused to recede from its former uniform holdings and concluded the syllabus as follows:

> "* * * *held*, further, that the rule announced in the case of *Pigeon et al.* v. *Buck et al., supra*, is adhered to and held to be a rule of property."

Thus, the court will observe that our own Supreme Court in passing upon this identical question holds that its own decision of *Pigeon* v. *Buck, supra*, established a rule of property that it now declines to disturb. Our court at this time in rendering its opinion upon this question does not discuss the soundness or unsoundness of the *Shulthis* v. *McDougal* case, *supra*, but bases its opinion upon the principle that a rule of property has been established.

In this connection we wish to call the attention of the court to the fact, which we assume will not be and cannot be disputed, and that is, since May, 1909, the Department of the Interior has adopted the theory of the *Shulthis-McDougal* case. We also call the attention of the court to the conditions that

have existed on the Indian Territory side of Oklahoma since said decision was rendered. The land up until the year 1908 practically all belonged to Indians, the most of which could not be sold except through the Department of the Interior. The people who have come to this portion of the state to purchase homes placed a great deal of confidence in the construction of this question by the Interior Department, and as a matter of fact the Indians look upon the Interior Department as almost infallible.

In *McDougal* v. *McKay et al., supra*, the Supreme Court of Oklahoma, quotes from a decision of the Supreme Court of the United States, in *Minnesota Company* v. *National Company*, 3 Wall. 332, as follows:

> "Where questions arise which affect titles to lands it is of great importance to the public that when they are once decided, they should no longer be considered open. Such decisions become rules of property, and any titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are restrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law

when the administrator of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well considered and solemn judgments."

The same decision quotes from Vol. 11 Cyc, page 755, as folows:

"Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of *stare decisis* to adhere to such decisions without regard to how it might be inclined to decide if the question were new. And this rule obtains, although the court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled law and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable."

It will thus be seen that the Supreme Court of Oklahoma is fixed in its opinion that the rule declaring these estates to be ancestral is a rule of property and must be followed.

Counsel for plaintiff in error makes the contention that the decision in the case of *Shulthis* v. *McDougal*, and *Pigeon* v. *Buck*, *supra*, as well as other cases heretofore cited, have not been handed down a sufficient length of time to become a rule of prop-

erty, such as would be recognized by this court. This matter should be viewed by the court as it actually is, and the true condition considered that exists. It is a well known fact to all courts that Congress made no provision for the sale of Indian lands until the year 1908, with the possible exception of a few mixed bloods. No titles were acquired on the strength of any Arkansas cases construing Chapter 49, so often mentioned by counsel for plaintiff in error. This is true for the simple reason that Indian land on the Indian Territory side of the state was inalienable. After the Act of May 27, 1908, which took effect two months later, which provided for the sale of Indian lands by the heirs of deceased allottees, which said sale to be approved by the County Court having jurisdiction of the estate of the deceased allottee, then, and not until then, was there any appreciable amount of land purchased on the Indian Territory side of Oklahoma. This is a new country; it is filled with people from the older states. Our people came here, many of them, to obtain a home, and since the passage of the Act of May 27, 1908, and the handing down of the *Shulthis-McDougal* decision, in May, 1909, many thousands of homes have been purchased. Our County Courts delegated by the Act of Congress to approve these conveyances have uniformly followed the rule of the case of *Shulthis* v. *McDougal*, *supra*, in determining who were the heirs of deceased Indians.

The contention that counsel makes that these decisions upon which we rely to establish the rule of property, have not been in vogue long enough to establish the rule, is unsound, viewed in the light of the actual conditions existing on the eastern side of Oklahoma. It is true that a decision relating to real estate in older states should stand a long time before it becomes a rule of property, but in this state this rule does not have so much force.

There have been more homes bought, more lands purchased, more titles acquired, on the eastern side of Oklahoma since the *Shulthis-McDougal* case was decided than have been in the same amount of territory in the older states like Ohio, Indiana and Illinois, in the past thirty years. If time should be measured by the volume of land transactions, as compared to other states in the Union, it would be at least fifty years since the public began to follow the principles announced in the *Shulthis-McDougal* case.

Our own court has held specifically that the rule of property has been established, and we know of no reason why this court can say that our court is mistaken.

Construction of Indian Treaties by State Courts.

Congress entered into certain treaties with Indians respecting titles to Indian lands, which constitutes all old Indian Territory, or Eastern Oklahoma. These treaties provided for the alienation of this

land by the allottee. Congress also provided for statehood, which necessarily meant that we should have courts. Congress contemplated that it would be necessary for our state courts to construe various Indian treaties. Our courts on the eastern side of Oklahoma have more to do with Indian lands than all other litigation combined. Our civilization could not exist if our courts in this part of the state could not pass upon and decide Indian land questions and construe Indian treaties.

Inasmuch as the people of Oklahoma alone are concerned with Indian treaties and special statutes relating to the Five Civilized Tribes we say that it is not bad reasoning to make the contention that the decisions of Oklahoma courts upon these questions are binding and should not be disturbed merely because they happen to be Indian treaties or Acts of Congress. They are local laws, the construction of which governs Oklahoma homes. However, the question of the rights of the state courts to construe Indian treaties with reference to the establishment of the rule of property, has often been before this court. It has been held by this court that it will follow the state courts in the interpretation of Indian treaties and special statutes relating to Indians.

—*Best* v. *Polk*, 18 Wall. 112, 21 L. ed. 805;
Francis v. *Francis*, 203 U. S. 232, 51 L. ed. 165;
Patterson v. *Jenks*, 2 Pet. 216, 7 L. ed. 402;

Rhode Island v. *Mass.*, 12 Pet. 746, 9 L. ed. 1269;

Lattimer v. *Poteet*, 14 Pet. 18, 10 L. ed. 335.

This question was first decided in the appellate court in May, 1909, and has been uniformly followed by the district and probate courts of this state since that time, as being the only expression of an appellate court on the question. So great is the land litigation in the eastern part of this state, so many suits have been brought and decided on this question, so many estates have been settled in accordance with this view, that we believe it would be calamitous to adopt a different rule. The applicability of this law, we think, should argue the following of this theory, should the court conclude the scales to be evenly balanced between the theories. The doctrine of new acquisition, with its life estates, contingent life estates, remainders, vested and contingent, is out of tune with the modern laws of succession. Not only that, but it is peculiarly unadapted to the Indian manner of life. Inheritance and heirship are far more difficult to determine among the Indians than among the peoples of the surrounding states. Their mode of life, their scant and sometimes wholly unavailable family records, make a law of inheritance with remainder interests to collateral kin, sometimes far removed, wholly unsuited to their habits of life. The adoption of the theory of ancestral estates will bring the law of inheritance before statehood very closely in accord with that we now have in the State of Ok-

lahoma. If this is not done, years hence, when dates of death have been forgotten, collateral kin have passed away, leaving representatives to the fourth and fifth generations, the inheritance of these estates, which comprise nearly all the lands in the old Indian Territory, will be matters of continual litigation, with never any certainty of titles. It is very easy to determine the parentage of a decedent, but after years of time may be very difficult to ascertain the uncles, aunts, cousins and others to further degrees. We believe, such being the case, public policy will dictate a following of the *Shulthis* case.

The appellee, Charles W. Miller, in this case represents the established law of descent in the State of Oklahoma. The theory represented and defended by him is the law of that state at the period in question, as recognized by the Supreme Court and all inferior courts of that state. This theory is the established theory of the bar of that state. Whatever might have been the differences of opinion prior to the decision of the United States Court of Appeals in the *Shulthis* case, they were quickly adjusted, and *all* courts of the state proceeded to follow, with the approbation of all lawyers, save a few. We say, without fear of contradiction, that there is not a respectable minority of lawyers in the state who hold otherwise, and among laymen there are few who know there has been a controversy.

A Reply to Contentions of Plaintiff in Error.

We assume that these decisions close the matter, but inasmuch as the learned counsel has taken so much time and space arguing several attacks on these decisions, we will notice some of them, in order that we may not be deemed to admit the correctness of any of them.

The brief takes a great many pages and a wide range of decisions to discuss and establish that the decisions of Arkansas were adopted by Congress along with the statute. This seems idle to us, as it is perfectly evident that the Supreme Court of Arkansas has never decided whether an Indian estate allotted to an Indian by virtue of his tribal blood, is ancestral or a new acquisition. The first time such a question ever came before an appellate court was when the United States Circuit Court of Appeals for the Eighth Circuit, in May, 1909, decided the case of *Shulthis* v. *McDougal*. They were bound by no decisions of the Supreme Court of Arkansas, for there were no decisions by that court on that question to bind them. They had decided in specific cases before them, under certain proven facts, that some cases were ancestral and some new acquisitions, but they had never had before them any case that involved the facts in a Creek Indian allotment.

In plaintiff in error's brief great stress is laid upon the case of *Magness* v. *Arnold*, 31 Ark. 103. This case involves the pre-emption of certain lands

of the United States. The court in this case bases its finding that the lands are a new acquisition in this case from the recitals of the patent. The court says:

> "It is recited in the patent that the certificate of pre-emption was deposited in the land office of the United States by Mary Ann Magness, who had made full payment for the land.
>
> "If such was the case, then the land was a new acquisition. If, however, the pre-emption right was her father's, by virtue of his occupancy and cultivation, and the purchase money paid by him, or with money of his estate after his death, then a question would arise whether Mary Ann did not hold by descent, even though the patent may have been issued in her name," etc.

Also *Hogan* v. *Finley*, 52 Ark. 55.

But to our mind these decisions and the reason on which they are based are of little moment, one way or the other. They are not applicable to the case at bar. The facts on which they are based are different. Both cases are independent grants to the patentees, the one from the United States and the other from the State of Arkansas. Neither patentee had any prior rights in the land involved, either as a tenant in common or an occupant. Both tracts were lands of the sovereignty given as a bounty to persons who complied with certain conditions as to cultivation, etc.

The case of *Hogan* v. *Finley*, upon which he also relies, does not directly involve the question. The

land was a "donation" from the state, and the state donation laws required many things to be done other than the payment of certain fees to the state.

Here follow certain sections from the Act of December 23, 1840, relating thereto:

> "*Sec. 4250.* If any one shall obtain such donation to a tract of improved land, he shall pay to the person owning such improvement double the value thereof, to be recovered before any court having jurisdiction of the matter *(c)* Act, Dec. 23, 1840, Sec. 3. * * *
>
> *Sec. 4253.* Upon filing with the commissioner of state lands a written application, and the affidavit provided for in section 4252, such commissioner shall issue a certificate, under his hand and seal, setting forth that such applicant had applied for a donation of the right of the state to the land described in the application, which certificate shall further state that, if within eighteen months from the date of the application the applicant shall present proof to the commissioner that he or she resides upon, and has cleared, fenced and put in readiness for cultivation five acres, the donee shall be entitled to a deed from the state, conveying all the right, title and interest of the state in and to the land mentioned in the certificate. *Ib.*, Sec. 3.
>
> *Sec. 4254.* Each individual receiving such donation shall, upon completing the improvements required to be made upon said land, obtain from some justice of the peace residing in the township where said land is situated *(d)* certificate setting forth the quarter section, township, range and county where said land is situated, that he has been, within ten days next pre-

ceding the date of his certificate, on the identical tract described, and that the improvement on said land is a *bona fide*, substantial improvement, and shall state the number of acres cleared, fenced and ready for cultivation upon said land, which certificate shall be attested by the justice taking the same, and filed in said commissioner's office; and such certificate, or an authenticated copy thereof, shall be evidence that the donee has complied with that part of the law requiring the land to be improved. Act, Dec. 23, 1840, Sec. 5."

Counsel for plaintiff in error devotes many pages in an effort to show that the lands involved are not lands of the Creek Nation, but are public lands of the United States, but the statutes, direct and constructive, and the decisions, are the other way.

Section 2 of the Original Creek Treaty (31 Stat. L. 861) is as follows:

"2. *All lands belonging to the Creek tribe of Indians* (our italics) in the Indian Territory, except townsites and lands herein reserved for Creek schools and public buildings, shall be appraised at their true value, excluding only improvements on lands in actual cultivation. The appraisement shall be made under the direction of the Dawes Commission by such number of committees, with necessary assistance, as may be deemed necessary to expedite the work, one member of each committee to be appointed by the principal chief; and if the members of any committee fail to agree as to the value of any tract of land, the value thereof shall be fixed by

said Commission. Each committee shall make report of its work to said Commission, which shall from time to time prepare reports of same, in duplicate, and transmit them to the Secretary of the Interior for his approval, and when approved one copy thereof shall be returned to the office of said Commission for its use in making allotments herein provided."

Section 23 (in part) of the same act is as follows:

"23. Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

* * * * * * *

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided

herein, *and as a relinquishment of all his right, title, and interest in and to the same* (our italics) except in the proceeds of lands reserved from allotment.

The acceptance of deeds of minors and incompetents, by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents, to allotment and conveyance of all other lands of the tribe, as provided herein.

* * * * * * *

All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records."

It will be seen in the treaty and in the Congressional enactment that these lands were recognized as Creek lands and not lands of the United States. Following the law, the patents were issued by the duly authorized authorities of the tribe. A sample patent, which happens to be a copy of the patent issued to Waitie Washington, is here included:

"No. —— Book —— Page ——

To All Whom These Presents Shall Come, Greetings:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats. 861), agreement ratified by the Creek Nation, May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the

citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment, forty acres of land as a homestead, for which he shall have a separate deed; and

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Waitie Washington, a citizen of said tribe, as an allotment exclusive of a forty-acre homestead, as aforesaid.

Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Waitie Washington, all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said nation in and to the following described lands, *viz.:*

> The west half of southeast quarter and northeast quarter of southeast quarter of section thirty-six (36), township eight (8) north, range eight (8) east,

of the Indian Base and Meridian, in Indian Territory containing 120 acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 3rd day of September, A. D. 1902.

P. PORTER,

(Seal) *Principal Chief of the Muskogee (Creek) Nation.*

Department of the Interior.

Approved Dec. 22, 1902.

THOS. RYAN, *Acting Secretary.*

Filed for record in Dawes Com. Office, Dec. 30-1902, Book 4-454."

It will thus be seen that in accord with the statute (Sec. 23, quoted above) the patent provided that there was conveyed to Waitie Washington "all right, title and interest of the Muskogee (Creek) Nation, and of all other citizens of said Nation in" (describing his lands).

It seems here that it is the Creek Nation and not the United States that is patenting these lands to the Indians. It also seems to be recognized in this act from the fact that they are required to relinquish other lands, that they have an interest in all the lands and something closely analogous to a tenancy in common, at least more so than to any other estate.

In pages 217 to 225 of his brief counsel for plaintiff in error propounds some questions by which he evidently would show the doctrine of ancestral

estates inapplicable to the conditions here. He has evidently not attempted to reconcile the statutes or he would find the answer to every question readily. The questions so far as we are able to separate them are about as follows:

1. Where does allottee who is a white man (meaning intermarried citizen) get his allotment?
2. Where would estate go if relatives all dead?
3. How when Indian married into other tribe?
4. How when Creek has children who are members of two different tribes because of diverse marriages?
5. If child whose mother was dead, and who was citizen, and having no other relatives, should die, who would inherit?
6. If same child had maternal grandfather, who?
7. How would estate of negro citizens descend?

1. *Where does allottee who is a white man (meaning intermarried citizen) get his allotment?*

In answer to question one the decision does not attempt to say that an allotment made to a white man is ancestral. There are no citizens of the Creek Nation who are whites, except five adopted citizens. These adopted citizens evidently received their allotments as new acquisitions, inasmuch as neither their parents nor their children are citizens of the tribe and have no rights therein. In the Choctaw and

Chickasaw Nations there is another class of white citizens, those by intermarriage. These would hold their allotments probably as new acquisitions, inasmuch as they had to pay the tribe a sum of money of an estimated value, for a "tribal right," when they were enrolled as such citizens. Further their children, unless their other parent was a citizen by blood, would not be entitled to citizenship in any nation. It has been held by the Supreme Court of Oklahoma where the mother was a citizen by blood and the father by intermarriage, then the child received its right to an allotment by blood of the mother and that the mother would inherit.

—*Gillum* v. *Anglin*, ... Okla. ..... (not yet reported).

(See Appendix B, p. 7, for above opinion.)

The provision under which the rolls were prepared was Sec. 21, of the original Curtis Bill (30 Stat. L. 495) and that part pertaining to intermarried whites, which is italicized, is as follows:

> "*Sec. 21.* That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes, is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding Acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and

all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, *with such intermarried white persons as may be entitled to citizenship under Cherokee laws.*" * * *

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, *with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.*"

There are no intermarried citizens of the Creek Nation. There are a few more than 10,000 citizens by blood, about 5500 freedmen citizens and only five citizens by adoption. The courts can hold that the citizens by adoption take their allotments as new acquisitions or otherwise without affecting the reasoning or the holding in *Shulthis* v. *McDougal.*

2. *Where would estate go if relatives all dead?*

We assume counsel means by this question, where, if all relatives by blood should be dead. Very easy to say. If there were no relatives of the blood to inherit it would go to relatives not of the blood, under the provision of Sec. 6, of the Supplemental Creek Agreement, heretofore set out at page 6 of this brief.

But there is a complete scheme in the absence of that section. We have set out in the appendix to this brief chapter 49 of Mansfield's Digest of the Arkansas Statutes in full. It will be seen under Sec. 2534 of that chapter, it is provided:

> "In all cases not provided for by this act, the inheritance shall descend according to the course of the common law."

3. *How when Indian married into another tribe?*

This question is so confused with argument in plaintiff in error's brief that we are at a loss to get at the exact meaning. We assume, that he means a child whose mother was a citizen of the tribe giving the allotment, and that such mother died without other relatives. The answer would be the same as the answer to question two. If there were children of the allottee as is suggested in one place in the mixed question and argument, then no question could arise, for the only time the question arises is where allottee dies "without descendants."

4. ***How when Creek has children who are members of two different tribes because of diverse marriages?***

The question could not arise in such a case as in previous question because the governing section applies only when allottee dies "without descendants."

5. ***If child whose mother was dead, and who was citizen, and having no other relatives, should die, who would inherit?***

If no relatives of the blood of the mother should survive, then to the other relatives according to the course of common law.

6. ***If same child had maternal grandfather, who would inherit?***

Certainly the maternal grandfather as was contemplated by the statute. It has been carried so far many, many times under the Arkansas and similar statutes, and no one has suffered any hardship, or none that was not contemplated and has not been always recognized.

7. ***How would estates of negro citizens descend?***

In the same way as that of Creeks by blood. They received their allotments by the blood of their tribal (freedmen) parents. The paragraph of the

Original Curtis Bill (30 Stat. L. 495) which provides for enrollment of Creek freedmen is a part of Sec. 21, and is as follows:

> "The roll of Creek freedmen made by J. W. Dunn under authority of the United States prior to March 14, 1867, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation."

There were no "other persons of African descent enrolled" and all freedmen in the Creek Nation received their allotments by virtue of being on the Dunn Roll, or by being their descendants. Practically all were descendants. As to those who were not descendants they acquired their rights under Art. 2, Creek Treaty of 1866 (14 Stat. 785), as follows:

> "ARTICLE 2. The Creeks hereby covenant and agree that hence forth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek Country under their laws and usages, or who have been

thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens (thereof) shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe."

These persons had been slaves of the Creeks for years and acquired their status by descent from former slaves. They individually, as the facts in the case might show, might be held to be new acquisitions or ancestral estates by the courts. There are so few of these, their number and effect is negligible.

We have gone into each of these questions and given merely our theory of what the courts would hold and to show that the questions presented were easily solved. We believe the ancestral theory as applied to the class of cases into which this one falls, presents a perfect scheme of descent and is the correct and proper one.

Third Division

That the said Supreme Court erred in holding and deciding that said lands in controversy belong to said Charles W. Miller and that said plaintiff in error had no right, title, interest or estate in or to said lands, without making or requiring to be made as parties thereto the said Frank L. Warren, Union Central Life Insurance Company, L. U. Humphrey and L. L. Humphrey, as prayed for by said plaintiff in error in his said answer; and in which said decision and holding, as aforesaid, there was drawn in question and necessarily decided Section 1 of the Fourteenth Amendment to the Constitution of the United States, which declares that, "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and that said decision and holding is repugnant to and in conflict with said section of said Fourteenth Amendment and deprives the plaintiff in error of his right, title, interest and estate in and to said lands, without due process of law, and denies the said plaintiff the equal protection of the laws, as made and provided in said section. ***(Plaintiff in Error's Assignment No. 1.)***

Under our third division we will discuss the miscellaneous matters presented by counsel for appellant under First Assignment of Error.

The assignment as shown by its language alleges error merely because the trial court refused to make certain specified persons parties to suit. The assignment itself and that part of the argument directed toward it is beyond us. When the court reached the conclusion that the plaintiff in error, George Washington, inherited no interest in the lands in question, then it became useless to add other parties to the suit at his instance as he was in no way injured by the instruments under which they held, and very properly took no action on that part of the prayer. It would not have been error under section one of the Fourteenth Amendment to the Constitution, to refuse to make such persons parties even had the court found that plaintiff in error had an interest.

It would deny him no right or remedy. If he could have recovered in the action, he could still have brought suit against these persons to remove the alleged clouds, and could have litigated the matters to a conclusion.

The adding of such parties, even had the decision of the court been favorable to plaintiff in error, was a matter of discretion, and denied him no right or remedy.

Plaintiff in error under this assignment has seen fit to discuss other matters which are not in the case, and which are no part of the assignments of error.

Counsel for plaintiff in error presents the following questions which we will notice, but which we earnestly insist cannot be considered:

1. That the Supreme Court of Oklahoma erred, as a matter of practice, in sustaining a motion for judgment on the pleadings.
2. That the deed from Cissie Cosar to Frank L. Warren, set up in answer of plaintiff in error, is void because County Courts did not have *authority to approve deeds*, where death occurred prior to May 27, 1908.

1. *That the Supreme Court of Oklahoma erred, as a matter of practice, in affirming the action of the trial court in sustaining a motion for judgment on the pleadings.*

In this case the trial court held that the answer of Washington, coupled with the admission that plaintiff was in the possession of the premises, was sufficient to enable the court to render judgment on the pleadings in favor of Miller.

This is not such a question as a matter of pleading and practice as can be reviewed by the Supreme Court of the United States. It has been settled by so many decisions of this court that it is not open to discussion.

So far as respects any matter of procedure, the decision of the state court is conclusive.

—*Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. ed. 1165;

West River Bridge Co. v. *Dix.*, 6 How. 507, 12 L. ed. 535;

Bucher v. *Chishire R. Co.*, 125 U. S. 555, 31 L. ed. 795;

Adams Express Co. v. *Ohio*, 165 U. S. 194, 41 L. ed. 683;

Johnson v. *Drew*, 171 U. S. 93, 43 L. ed. 88;

California Nat. Bank v. *Thomas*, 171 U. S. 441, 43 L. ed. 231;

White v. *Wright*, 22 How. 19, 23, 16 L. ed. 279;

Renaud v. *Abbott*, 116 U. S. 277, 29 L. ed. 629;

Patterson v. *Colorado*, 205 U. S. 454, 460, 51 L. ed. 879.

Practically an exact parallel to the question at issue is found in *Iowa Central Railway Company* v. *Iowa*, 160 U. S. 289, 40 L. ed. 467. In that case the court said:

> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, *viz.:* whether or not the highest court of a state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of the plaintiff."

The practice in this case has been the uniform and universal practice in the State of Oklahoma.

Where an answer shows by its affirmative averments that the plaintiff should recover, a motion for judgment on the pleadings will lie.

2. That the deed from Cissie Cosar to Frank L. Warren, set up in the answer of plaintiff in error, is void because County Courts did not have authority to approve deeds where death occurred prior to May 27, 1908.

This question is not before this court for review for the reason that it is not in the assignment of errors; the Act of May 27, 1908, which is in issue was not raised in any of the pleadings, was not considered by or presented to either the trial court or the Supreme Court of the State of Oklahoma.

Where the appellate jurisdiction of the United States Supreme Court is invoked on account of the decision of the highest court of a state against some title, right, privilege or immunity, claimed under the Constitution, or any treaty, statute, commission or authority of the United States, the statute provides that such title, right, privilege or immunity must be specifically set up or claimed.

—U. S. Rev. Stat. Sec. 709.

This means that the record must show clearly and unmistakably that such title, right, privilege or immunity was declared upon specifically. It is not sufficient if the declaration is so general in its char-

acter that the purpose to assert a federal right is left to mere inference.

—*Zadeg* v. *Baldwin*, 166 U. S. 485;
Oxley Stove Co. v. *Butler*, 166 U. S. 648;
Miller v. *Ry. Co.*, 168 U. S. 131;
Dewey v. *Des Moines*, 173 U. S. 193;
Chapin v. *Fye*, 179 U. S. 127.

In this case there is never a hint any where in the record that the Act of May 27, 1908, is called in question. As a matter of fact it was never so called to the attention of the trial or state Supreme Court, is not in its opinion and cannot be raised here.

Further this is a matter in which plaintiff in error is not at all interested. He gains or loses nothing by the deed of Cissie Cosar. If he has no interest in the property he has no basis on which to fight the battles of Cissie Cosar. She was a party in the trial court and is not in this court making complaint.

Whether or not any title was passed in that deed from her is immaterial so far as George Washington is concerned. Defendant in error, Miller, is in possession of the premises holding under chain of title from Cissie Cosar, the owner of the land, and that is sufficient in a suit to quiet title against one who has no interest in the premises.

But it has been uniformly held that the approval of the County Court is sufficient no matter what the date of the death of the decedent; that it

is the date of the instrument of conveyance and not the date of the death that governs.

—*MaHarry* v. *Eatman*, 29 Okla. 46, 116 Pac. 935;

Harris v. *Gale*, 188 Fed. 712;

U. S. v. *Knight & Avery*, 206 Fed. 145.

In the latter case, the suit was instituted in the United States Court for the Eastern District of Oklahoma and a decision had favorable to the validity of the deed, holding the approval of the Secretary of the Interior unnecessary. The trial of the case, on the part of those attacking the deed was under the direction of the attorneys for the Department of the Interior. The case was appealed to the United States Circuit Court of Appeals for the Eighth Circuit where it was affirmed. Whereupon the Interior Department decided not to prosecute the appeal further and to abide by the decision, and made public announcement of the fact in order to settle all titles.

But it does not appear in the case at bar that the deed in question was not approved by the Secretary of the Interior. It is presumed that it was so approved, in the absence of a showing to the contrary.

In *St. Louis & S. F. Ry. Co.* v. *Skelton*, 141 Pac. (Okla.) 440, the court in its syllabus says:

"A deed executed May 12, 1902, by a full-blood Creek Indian and his wife conveying land for right-of-way to a railroad company for rail-

road purposes, executed pursuant to the Act of Congress approved February 28, 1902, known as the Enid and Anadarko Act, 32 Stat. 43, c. 134, being regular on its face, in the absence of any proof to the contrary, is presumed to have been obtained according to law; and, where the record shows conclusively that the adverse claimant to such land has absolutely no title to same, the deed to the railroad company from the allottee is sufficient to entitle the railroad company to recover on the strength of its own title."

The court in that case cites approvingly *U. S. v. Ft. S. and W. Ry. Co.*, 195 Fed. 21, 115 C. C. A. 163, where it was held:

> "Counsel calls attention to the fact that the lands were not alienated by the allottees until May 26, 1906, except with the approval of the Secretary of the Interior. But the railroad company obtained from these allottees and paid them for its right-of-way over these allotments, and the legal presumption, in the absence of pleading and proof to the contrary, is that it did so lawfully, and if that were necessary, that the Secretary approved their conveyances to it of these rights."

We do not wish to lend undue importance to these questions which have been brought into this assignment improperly, and only take space to answer them in order that the court may have the benefit of the decisions on these questions, should it deem them necessary. While satisfied with our theory that they are not in the case under the as-

signment, yet we do not wish to concede a single point to plaintiff in error. We believe every position he has taken in his brief is incorrect, and we feel that the decision of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

NATHAN A. GIBSON,
Attorney for Defendant in Error, Charles W. Miller.

APPENDIX

CHAPTER FORTY-NINE, MANSFIELD'S DIGEST, STATUTES OF ARKANSAS . . . .

OPINION SUPREME COURT OF OKLAHOMA *IN RE. GILLUM VS. ANGLIN* . . . . . .

OPINION SUPREME COURT OF OKLAHOMA *IN RE. McDOUGAL VS. McKAY, ET AL.* . . .

Appendix A

Chapter 49, Mansfield's Digest Statutes of Arkansas.

Section 2522. When any person shall die, having title to any real estate of inheritance, or personal estate *(b)*, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children, or their descendants, in equal parts.

Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts.

Sec. 2523. Posthumous children of the intestate shall inherit in like manner as if born in the lifetime of the intestate, but no right of inheritance shall accure to any person other than the children of the intestate, unless they be born at the time of the intestate's death.

Sec. 2524. Illegitimate children shall be capable of inheriting and transmitting an inheritance, on the part of their mother, in like manner as if they had been legitimate of their mother. *(c)*

Sec. 2525. If a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate.

Sec. 2526. The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered legitimate.

Sec. 2527. In making title by descent, it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate is, or has been, an alien.

Sec. 2528. If there be no children, or their descendants, father, mother, nor their descendants, or any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate. If there be no such wife or husband, then the estate shall go to the state.

Sec. 2529. If any of the children of an intestate be living, and some be dead, the inheritance shall descend to the children who are living, and to the descendants of such children as shall have died, so that each child who shall be living shall inherit such share as would have descended to him if all the children of the intestate who shall have died leaving issue had been living, so that the descendants of each child who shall be dead shall inherit the same their parent would have received if living.

Sec. 2530. The rule of descent prescribed in the last preceding section shall apply in every case where the descendants of the intestate, entitled to share in the inheritance, shall be in equal degree of consanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them had all the descendants in the same degree who shall have died leaving issue been living, so that the issue of the descendants who shall have died shall respectively take the shares which their parents, if living, would have received.

Sec. 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided *(d)*.

Sec. 2532. The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred either lineal or collateral, who stand in a nearer relation.

Sec. 2533. Relations of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance come to the intestate by descent, devise, or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Sec. 2534. In all cases not provided for by this act, the inheritance, shall descend according to the course of the common law.

Sec. 2535. Whenever an inheritance, or a share of an inheritance, shall descend to several persons, under the provisions of this act, they shall inherit as tenants in common, in proportion to their respective shares or rights.

Advancement.

Sec. 2536. If any child of an intestate shall have been advanced by him, in his lifetime, by settlement or portion of real or personal estate, or both of them, the value thereof shall be reckoned, for the purpose of this section, only as part of the real and personal estate of such intestate descendible to his heirs, and to be distributed to his next of kin, according to law; and, if such advancement be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as herein reckoned, then such child and his descendants shall be ex-

cluded from any share of the real and personal estate of the intestate.

Sec. 2537. In cases where such advancement is not equal to the share that such child or relative, and his descendants, shall be entitled to receive, they shall be entitled to receive so much of the real and personal estate as shall be sufficient to make all the shares of the heirs in such real and personal estate and advancement to be as nearly equal as possible.

Sec. 2538. The value of any real or personal estate so advanced shall be deemed to be that, if any, which was acknowledged by the person receiving the same by any receipt, in writing, specifying the value; if no such written evidence exists, then such value shall be estimated according to its value at the time of advancing such money or property.

Sec. 2539. The maintaining, educating or giving money to a child or heir, without a view to a portion or settlement in life, shall not be an advancement within the meaning of this act.

CONSTRUCTION.

Sec. 2540. The term "real estate" as used in this act, shall be construed to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of the intestate, seized or possessed thereof in any manner, other than by lease for years and estate for the life of another person.

Sec. 2541. The term "inheritance," as used in this act, shall be understood to mean real estate, as herein defined, descended according to the provisions of this act.

Sec. 2542. Whenever, in any part of this act, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent came; and when any person is described as having died, it shall be understood that he died before the intestate.

Sec. 2543. The expression used in this act "where the estate shall have come to the intestate on the part of the father," or "mother" as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent. Rev. Stat. chap. 49.

HEIRS AT LAW MAY BE MADE BY DECLARATION IN WRITING.

Sec. 2544. When any person may desire to make a person his heir at law, it shall be lawful to do so by a declaration in writing in favor of such person, to be acknowledged before any judge, justice of the peace, clerk of any court, or before any court of record in this state.

Sec. 2545. Before said declaration shall be of any force or effect, it shall be recorded in the county where the said declarant may reside, or in the county where the person in whose favor such declaration is made may reside. Act Jan. 12, 1853.

Appendix B

Opinion Supreme Court of Oklahoma *in re. Gillum vs. Anglin.*

In the Supreme Court of the State of Oklahoma. Supreme Court Commission. Division Number Two. H. Tillman Gillum, Plaintiff in Error, v. W. Thomas Anglin, Defendant in Error. —No. 2882.

SYLLABUS.

(1) Upon the death of mixed-blood minor children of the Choctaw Tribe of Indians, the fee in their allotments ascends to the parent of tribal blood and not to the parent who has become a citizen of the tribe by virtue of an intermarriage.

(2) A deed, to lands which have been held by an adverse claimant in open, notorious and exclusive possession and control for a period of four or five years next prior to the deed, such adverse claimant having collected all the rents and profits, and having openly and notoriously claimed an estate in such lands under the provisions of chap. 49, Mansfield's Dig. of the Stat. of Ark., is champertous as between the grantee and such adverse claimant.

(3) Where an answer contains statements of facts which of themselves constitute a defense to plaintiff's action, it is error to sustain a general demurrer to such answer.

Error from the District Court of Hughes County, Honorable TOM H. FANCHER, *Special Judge*.

Action in ejectment by W. Thomas Anglin against H. Tillman Gillum *et al.* Judgment for plaintiff, and defendant Gillum appeals. Reversed.

Lewis C. Lawson, for plaintiff in error, Warren and Miller, Roberts and Harris, for defendant in error.

HARRISON, C.,

This was an ejectment suit brought by W. T. Anglin against H. T. Gillum for possession of certain tracts of land aggregating about 670 acres. The material facts in the controversy are substantially as follows:

H. T. Gillum was a non-citizen but had married a woman of Choctaw blood. They lived together as man and wife for a number of years during which time four children were born to them. However, they finally separated and were legally divorced, and afterwards the wife, Emaline, married a man by the name of Dilbeck. In the meantime, the making up of the rolls for the Five Civilized Tribes had taken place and H. T. Gillum, by virtue of his being an intermarried citizen, was admitted to the rolls and allowed an allotment as other members of the tribe. He chose allotments for each of his four minor children by his Indian wife. Two of the children had died before allotments were chosen for them but same were afterwards selected by their father. Another one of the children died after the allotment had been chosen for it by its father, whom it is not denied, had been duly appointed administrator for the purpose of selecting allotments for each. After selection and award, the father took charge of the allotments of the deceased children, held possession of them, improved them and put them, at least a great portion of them, in cultiva-

tion, something like five hundred acres, and held possession of same upon the theory that, under the provisions of Chap. 49 Mansfield's Digest of the Statutes of Arkansas which was then in force in the Indian Territory by Act of Congress, he inherited title to the lands in question, or at least an undivided one-half interest in same. After the passage of the Act of Congress of April 26, 1906, removing restrictions from the sale of inherited lands in the hands of mixed-blood heirs, Emaline Dillbeck joined by her husband S. M. Dillbeck, acting upon the theory that the lands of her deceased children ascended to her by reason of her Indian blood, and that their allotments came to them through and by virtue of her Indian blood not by virtue of their father's intermarriage with her, and that therefore, she inherited their allotments, and upon such theory she and her husband executed a warranty deed conveying said lands to W. T. Anglin, the defendant in error here. Thereupon, in August, 1909, he, Anglin, brought this ejectment suit against H. T. Gillum and his tenants.

The defendant, H. T. Gillum, answered, maintaining that the land in question either descended to Albert Gillum, the surviving child, and that therefore he would have a life estate in same, or that it passed clear to him and his former wife, and that, therefore, he had an undivided one-half interest in the fee in same as the heir of his three dead children, and set up the further defense that as he had been in full and complete and undisturbed possession and control of such lands since the allotments

had been taken, and had collected all the rents and profits therefrom during all those years from the time of taking the allotments to the date of the execution of the deed by the Dillbecks to Anglin, that therefore, holding and claiming same upon the theory that he had either a one-half interest in the fee or a life estate in the same, either of which was adverse to the interests sought to be conveyed to Anglin in the warranty deed from the Dillbecks to Anglin, such deed was champertous and void as between Anglin and him. The court sustained a demurrer to Gillum's answer, on the theory that it failed to state a defense, and the cause comes here on a transcript.

There are three material propositions of law involved in the case; *First*, whether the lands of those deceased children descended in part to the father by virtue of his intermarriage, or whether they descended in whole to the mother by virtue of her Indian blood; *second*, whether the deed was champertous; *third*, whether the court erred in sustaining the demurrer to Gillum's answer.

On the first proposition as to whether the father or mother inherited these lands, it appears to us that enough has been said in the case of *Shulthis* v. *M'Dougal*, 170 Fed. 529, to make the question clear as to which of the parents would inherit and to settle this phase of the controversy in the case at bar. The same application of chapter 49 of the Arkansas Statutes was sought to be made in the *Shulthis* case as in the case at bar, the difference in the *Shulthis* case and the case at bar being, that

in that case it was the father who was *was* the Indian by blood and the mother who was a non-citizen, and the controversy was as to who took the lands of their deceased children. Also, the further difference that these were Creek Indians while those in the case at bar were Choctaws. The reasoning in that case by AMMON, District Judge, who rendered the opinion, is clear, and forceful, but as both the reasoning and conclusions reached in such case are familiar to the members of the bar who have had to deal with like questions, we shall merely cite such case as authority on this phase of the question in the case at bar. It was held in that case that the allotment of the father a deceased child went to the father by virtue of the father's tribal blood, and that a deed to such allotment from the father was valid.

An effort is made by counsel for plaintiff in error to distinguish the case at bar from the *Shulthis* case because the *Shulthis* case was a Creek Indian case, and that under section 6 of the Supplemental agreement with the Creek Indians, non-Creek citizens were expressly prohibited from taking Creek lands by inheritance or otherwise so long as there was a Creek heir to take it, and that no such treaty provision was made between the United States and the Choctaw tribe. But the decision in the *Shulthis* case is not based upon this ground. It is based solely upon the ground that the lands of the Creek tribe belonged to such tribe as a tribe, belonged to them in common as a society or tribe. That is, prior to allotments. That when the time for allotment came,

the minor children of members of the tribe took their allotments, not by virtue of their being the offspring of an intermarried citizen (mother), but by virtue of their Indian blood which came through their father, and that in case of death of such minor heir its estate ascended to the parent through and by virtue of whose tribal blood such minor acquired the right to an allotment. This being a federal question we feel bound by the doctrine announced by the federal courts. It follows, therefore, that the fee in the allotments of her deceased minor children went to the mother and that after the Act of April 26, 1906, took effect, she could convey a valid title to such allotments. See also *McKee* v. *Henry*, 201 Fed. 74.

Also, in the case of *Pigeon et al.* v. *Buck*, 38 Okla. 101, 131 Pac. 1083, this court in following the doctrine announced in the *Shulthis* case, *supra*, wherein the same question of descent and distribution of Indian lands are involved, said:

> "Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property."

And *Roberts* v. *Underwood*, 38 Okla. 376, 132 Pac. 673, was decided under the rule announced in *Pigeon* v. *Buck*, *supra*.

The next question is, whether the deed to Anglin was champertous. It was alleged in Gillum's answer that he held the land upon the theory that he had the right to possession of same either upon the ground that he had inherited the one-half un-

divided interest in the fee, or upon the ground that if it descended to the surviving child that he still had a life estate in same, and that upon such theory he was holding such lands openly, notoriously and exclusively at the time the deed was taken and that such possession, open, notorious and exclusive as it was, was adverse to the interest and rights sought to be conveyed in the deed from the Dillbecks to Anglin. The deed in question was a deed of general warranty. Under Sec. 1162 Rev. Laws 1910, the title and rights which were conveyed under a warranty deed are as follows:

> "A warranty deed made in substantial compliance with the provisions of this chapter shall convey to the grantee, his heirs or assigns, the whole interest of the grantor in the premises described, and shall be deemed a covenant on the part of the grantor that at the time of making the deed he is legally seized of an indefeasable estate in fee simple of the premises and has good right and full power to convey the same; that the same is clear of all incumbrances and liens, and that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession thereof, and will defend the title thereto against all persons who may lawfully claim the same; and the covenants and warranty shall be obligatory and binding upon any such grantor, his heirs and personal representatives, as if written at length in such deed."

Now, Anglin, the plaintiff below, demurred to Gillum's answer. He therefore, admitted the facts pleaded in the answer. That is, he admitted that Gillum was claiming the land in question and hold-

ing and exercising complete and exclusive control of same upon the theory that he either inherited an undivided one-half interest in the fee or a lifetime estate in same. This being true, it follows, that at the time Anglin took the deed, Gillum was holding possession of the land adversely to the rights and interests sought to be conveyed in such deed. The deed, therefore, falls under the rule announced in *Nicholas V. Bilby* v. *John W. Gilliland*, (on rehearing) . .. Okla. ....; *Miller* v. *Fyer*, 35 Okla. 145, 128 Pac. 713; *Ruby* v. *Nunn*, 37 Okla. 389, 132 Pac. 128, and is champertous and void as between Anglin and Gillum. It also follows, that such deed being champertous and void, the allegations in the answer to that effect constituted a defense to plaintiff's action and that the court erred in sustaining the demurrer. This disposes of the third proposition.

It is contended, however, that the surviving minor child, Albert Gillum, inherited the lands in question, and that the court committed numerous errors, which are presented and argued in plaintiff in error's brief, that were prejudicial to the rights and interests of such minor. But the conclusions which, under the authority of the *Shulthis* case we feel impelled to follow, preclude all rights of such minor heir in this controversy and adjudge the fee in such lands in the mother. We therefore, refrain from passing upon the assignments of error in reference to the rights of the minor, as the action and holdings of the court in this regard are wholly immaterial in the determination of this case. The minor had no interest in the fee at the time the deed

was executed. The title to the fee was in the mother but the deed was clearly champertous because it purported to convey rights and interests which were claimed and held possession of adverse thereto by Gillum. Hence, while we do not feel authorized to pass upon the question as to whether the rights of the mother or of Anglin might be properly protected in another action, yet we are constrained to hold from the record before us, that the judgment should be reversed and the cause remanded for judgment in harmony with these conclusions.

The judgment is reversed.

Appendix C

Opinion Supreme Court of Oklahoma *in re. McDougal vs. McKay et al.*

In the Supreme Court of the State of Oklahoma. D. A. McDougal, Plaintiff in Error, v. Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error.—No. 6372.

SYLLABUS.

1. Andrew Berryhill was a mixed-blood member of the Creek Tribe of Indians. He died while an infant, intestate, in November, 1901. Thereafter, his name was duly placed upon the rolls prepared by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior. The land involved and other lands were selected by an administrator and set apart to him as an allotment. Patent

was duly issued, conveying the land to his heirs. He left surviving his father, who was a mixed-blood member of the Creek Tribe of Indians, and his mother, who was a non-citizen and not a member of any Indian tribe, together with several uncles and aunts, members of the Creek tribe. *Held:* That under Mansfield's Digest, chap. 49, sec. 2531, which was in force in the Indian Territory by virtue of an Act of Congress, that the land involved was not a new acquisition, but came to him by the blood of his tribal parent, to-wit: his father, in whom the fee simple title to said land passed. (Following *Shulthis* v. *McDougal*, 170 Fed. 529; *Pigeon et al.* v. *Buck et al.*, 38 Okla. 101.)

2. The plaintiff in error tendered certain testimony of lawyers, for the purpose of showing that the rule laid down by the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal*, 170 Fed. 529, and the case of *Pigeon et al.* v. *Buck et al.*, 38 Okla. 101, had not been followed generally by the profession and trial judges. Objection was made to the introduction of this testimony, upon the ground that it was incompetent and immaterial, which objection was by the court sustained. *Held:* That the court committed no prejudicial error in sustaining said objection. *Held*, further, that the rule announced in the case of *Pigeon et al.* v. *Buck et al., supra*, is adhered to and held to be a rule of property.

Error from the District Court of Tulsa County, L. M. Poe, trial judge.—Affirmed.

Rosser & Cochran, attorneys for plaintiff in error; Ramsey & Thomas, attorneys for defendants in error.

OPINION OF THE COURT.

By RIDDLE, J. The admitted facts in this case are, that Andrew J. Berryhill was a member by mixed-blood of the Creek Tribe of Indians; that he died intestate, while an infant, in the month of November, 1901, leaving surviving him his father, George Franklin Berryhill, and his mother, Clementine Berryhill; that George Franklin Berryhill was a member, by mixed-blood, of the Creek Tribe of Indians, and legally enrolled; that his wife, mother of the deceased, Clementine Berryhill, was a noncitizen and not a member of any tribe of Indians; that Andrew J. Berryhill left no brothers or sisters surviving him; that on the 8th day of October, 1902, his name was duly and legally placed upon the tribal rolls of the Creek Nation as a member and citizen thereof by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior; that in the year 1904, there was set apart and allotted in the name of the said Andrew J. Berryhill, deceased, the lands involved in this suit with other lands; that in October, 1905, patents were duly issued, conveying the title to said land to the heirs of the said Andrew J. Berryhill, deceased; that on the 5th day of June, 1909, George Franklin Berryhill and wife, Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, for a valuable consideration, executed and delivered to defendants, Edmond McKay and Perry McKay, a warranty deed, conveying all their title and interest in and to the lands involved herein; that thereafter, the said Edmond and Perry McKay conveyed

their undivided one-third interest in said lands to John V. McKay; that Andrew J. Berryhill left surviving him the following uncles and aunts: Martha Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, Mary Kiefer and Josie Morton; that subsequent to August 8, 1907, the plaintiff, D. A. McDougal, received a conveyance from each and all of said uncles and aunts named herein, conveying to him whatever interest they each had, if any, in and to said land; that the defendant, Albert W. Shulthis, is in possession of said land under a lease contract made by the defendants, McKays, conveying to him the oil and mineral; and that he is operating and taking the oil from said land under said lease contract.

The plaintiff filed this suit in the District Court of Tulsa County to recover the lands in question, claiming to be the owner of the fee simple title, by virtue of his several conveyances received from the uncles and aunts of Andres J. Berryhill, deceased, and for an accounting for the value of the oil and gas taken therefrom; for the appointment of a receiver and to have his title to the lands quieted, subject to the life estate alleged to be owned by the McKays.

The principal question raised in this appeal is as to whether the title to the lands involved is an ancestral estate, or a new acquisition. The plaintiff contends that under the laws of Arkansas, which were in force in the Indian Territory and made applicable to the Creek Nation by virtue of an Act of Congress, the lands involved were a new acquisition,

and hence the father of Andrew J. Berryhill, deceased, took only a life estate. On the other hand, the defendants contend that under the decision by the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Shulthis* v. *McDougal*, 170 Fed. 529, and upon the authority of the decision of this court in *Pigeon* v. *Buck*, 38 Okla. 101, the title to the lands of a Creek citizen who died intestate, unmarried and without issue, descended in fee simple to the parent or parents who were of the tribal blood of the intestate, and that in the present instance the lands involved and which were a part of the allotment of Andrew J. Berryhill, deceased, passed to his father.

This court in the case of *Pigeon et al.* v. *Buck et al.*, *supra*, following the rule laid down by the Circuit Court of Appeals, said:

> "That the land in question was not a new acquisition, and pursuant to these sections, when construed together, passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Circuit in *Shulthis* v. *McDougal*, 170 Fed. 529, 95 C. C. A. 615. There Andrew J. Berryhill, son of George Franklin Berryhill, a member of the Creek Nation of mixed-blood, and Clementine Berryhill, his wife, a non-citizen of that tribe, died seized of an allotment. In determining who took the estate, the court construed these two sections together and held the person to be George Franklin Berryhill, the father of the deceased."

And, in concluding the opinion, the court further said:

> "We hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, this estate passed in equal moieties, and that plaintiffs in error, plaintiffs below, have no interest therein."

It cannot be questioned that the decisions of the federal court construing the Acts of Congress relating to the allotment, alienation, etc., of lands belonging to the members of the Five Civilized Tribes are conclusive upon the state courts. The decision of the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal, supra*, in the absence of an expression from the Supreme Court of the United States, should be followed by this court on all questions involving the construction of the federal statutes and allotment acts relating to the members of the Five Civilized Tribes. The question raised here by this appeal was directly involved in the case of *Shulthis* v. *McDougal, supra*, and directly adjudicated by the Circuit Court of Appeals, and that decision has been adhered to by this court in the case of *Pigeon et al.* v. *Buck et al., supra;* and whatever may be our individual views as to the soundness of these decisions, we are not at liberty to disregard them, but feel constrained to follow the rule laid down therein.

It is further contended by plaintiff that the trial court erred in excluding certain testimony of lawyers, tending to show that the rule laid down in the case of *Shulthis* v. *McDougal, supra*, was not

followed, either by the legal profession or generally by the trial courts. The purpose of tendering this evidence was to show that the rule announced by the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal*, *supra*, had not become a rule of property in this state. Objection was made to the introduction of this evidence, upon the ground that it was incompetent and immaterial; which objection was by the court sustained. We are now called upon to hold that this ruling of the court was error. Generally, a question of this nature is one of law for the court, and not of fact; and the courts will usually take judicial knowledge as to whether or not a rule announced by the court is of such character, general standing and application as to become a rule of property. The decision in the case of *Shulthis* v. *McDougal* was rendered by the Circuit Court of Appeals in *1899* and became final and has been in force in this jurisdiction for several years; and about a year before the present case was tried, this court had followed the rule laid down by the Circuit Court of Appeals in the case referred to, and held that the rule announced had become a rule of property. Owing to the fact that the decision of the Circuit Court of Appeals, in the absence of a final decision by the Supreme Court of the United States, is controlling in this state, when applied to the allotment and alienation of lands of the Five Civilized Tribes, and the further fact that this court in an opinion which has been in force over a year has followed the rule laid down by the Circuit Court of Appeals, and has held the same to be a rule of prop-

erty, we are of the opinion that the court committed no error in excluding this evidence.

Discussing this question, Vol. 11, p. 755, Cyc, states the rule to be:

> "Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of *stare decisis* to adhere to such decisions without regard to how it might be inclined to decide if the question were new. And this rule obtains, although the court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled law and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable."

Mr. Justice GREER, speaking for the Supreme Court of the United States, in the case of *Minnesota Company* v. *National Company*, 3 Wall. 332, stated:

> "Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided, they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are re-

trospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments."

The basis upon which the rule rests is not so much the actual condition existing as a matter of fact, but when a decision of the highest court in any jurisdiction has settled a question of this nature which may affect titles to property, it is conclusively presumed that parties have relied upon such decision as being the law when purchasing and selling property. While we are aware of the fact that a large per cent of the lawyers in the eastern side of this state were of the opinion that the titles to land similar to the title in question were a new acquisition, yet it may be conceded that the statute was subject to the construction placed thereon by the Circuit Court of Appeals, and that no great principle of law was disregarded in establishing the rule laid down by that court. While prior to the decision of this court in *Pigeon et al.* v. *Buck et al., supra*, following the rule laid down by the Circuit Court of Appeals, the lawyers and the courts generally may not have followed the decision of the Circuit Court of Appeals implicitly, yet if only a very small per cent of the people investing money in lands of this

character did so upon the strength of the rule announced by that court and as followed by this court, their titles should not be disturbed by a decision at this time holding that the land in question was a new acquistion. Such decision might disturb vested rights and bring into question many titles, which should be avoided, if possible.

We are therefore of the opinion that the court did not err in rejecting the evidence offered, and we still adhere to the rule laid down by this court in the case of *Pigeon et al.* v. *Buck et al., supra,* following the decision of the Circuit Court of Appeals, and we reiterate that the same has become a rule of property in this jurisdiction.

Finding no prejudicial error in the proceedings and judgment of the trial court, the same is affirmed.

All the Justices concur.

WASHINGTON *v.* MILLER.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 53. Submitted November 5, 1914.—Decided December 14, 1914.

Under the original Creek Agreement of March 1, 1901, controlling effect was given to the Creek tribal laws of descent and distribution rather than to the laws of Arkansas upon that subject put in force in the Indian Territory, and the provisions giving such effect to the tribal laws embraced allotments to living citizens as well as allotments on behalf of deceased citizens.

Under § 6 of the Supplemental Creek Agreement of June 30, 1902, the provisions of the agreement of March 1, 1901, giving effect to the Creek tribal laws of descent and distribution were repealed and the provisions of chap. 49 of Mansfield's Digest of the laws of Arkansas were substituted therefor with the proviso that only citizens of the Creek Nation should inherit lands of the Creek Nation except in instances where there were no such citizens to take the descent.

Section 6 looked to the future no less than to the present and is intended to prescribe rules of descent applicable to allotments and there is nothing in that section indicating that it was intended to be less comprehensive; the words "lands of the Creek Nation" as used therein mean lands in the Creek Nation and include such lands after as well as before allotment.

The provision in the act of April 28, 1904, making all the laws of Arkansas put in force in Indian Territory applicable to all persons and estates in that Territory, being general, did not operate to repeal the special provisos in § 6 of the act of June 30, 1902, confining the descent and distribution of Creek lands to citizens of the Creek Nation where there were Creek citizen heirs to take the inheritance.

Repeals by implication are not favored and usually occur only in cases of such irreconcilable conflict between an earlier and later statute that effect cannot reasonably be given to both.

Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is to remain in force as an exception to the general.

There is no incompatibility between a general statute purporting to

regulate descent and distribution of all lands within a Territory and a special statute directly regulating descent and distribution of a particular class of Indian lands therein.

Under § 6 of the agreement of June 30, 1902, regulating descent and distribution of Creek Indian allotments, the non-citizen father does not inherit where there are citizens heirs who can take the inheritance.

Questions concerning the effect of allegations and admissions which conflict with denials in the same pleading are matters of local pleading and practice, and the ruling of a state court thereon is not open to review in this court.

34 Oklahoma, 259, affirmed.

THE facts, which involve the construction and application of the laws of descent and distribution relating to Creek Indian allotments, are stated in the opinion.

Mr. Lewis C. Lawson for plaintiff in error.

Mr. Nathan A. Gibson for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a suit to quiet the title to lands within what until recently was the Creek Nation in the Indian Territory. The lands were allotted to an enrolled Creek, who died intestate November 3, 1907, after receiving the usual tribal deeds approved by the Secretary of the Interior. He left no widow or descendant, but was survived by his father and mother, two half brothers and a half sister on the paternal side and a half sister on the maternal side. The father was an enrolled Seminole and the mother an enrolled Creek. The half brothers and half sister on the paternal side were Seminoles and the half sister on the maternal side was a Creek. The plaintiff in the suit was in possession and claimed under a deed from the mother, executed July 16, 1909, and approved by the County

Court. See *United States* v. *Knight*, 206 Fed. Rep. 145. The father was a defendant and by his answer admitted the facts here stated and insisted that, although not a Creek citizen, he was an heir of the deceased allottee and as such had an interest in the lands. Upon this answer a judgment was given against him, which was affirmed by the Supreme Court of the State. 34 Oklahoma, 259. He then sued out this writ of error.

The ultimate question for decision is whether the father was an heir, and that involves an ascertainment and interpretation of the applicable law of descent.

The allotment was made and the tribal deeds were issued under the act of March 1, 1901, c. 676, 31 Stat. 861, known as the Original Creek Agreement, and the modifying act of June 30, 1902, c. 1323, 32 Stat. 500, known as the Supplemental Creek Agreement.

Before coming to the provisions of those acts, it may be helpful to refer to the situation existing at the time of their enactment. Long prior thereto the Creek Nation had adopted laws of its own regulating the descent and distribution of property of its citizens dying intestate. Creek Laws of 1867, § 6; Perryman's Compiled Creek Laws of 1890, § 6, p. 32, § 8, p. 76; Bledsoe's Indian Land Laws, 2d ed., §§ 829–831. Congress also had dealt with that subject. By the act of May 2, 1890, c. 182, 26 Stat. 81, §§ 30 and 31, it had "extended over and put in force in the Indian Territory" several general laws of the State of Arkansas, among which was Chapter 49 of Mansfield's Digest of 1884 relating to descent and distribution. At first the operation of this act was materially restricted by a proviso declaring that "the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian

Territory by this act shall not apply." But the proviso lost much of its force when the act of June 7, 1897, c. 3, 30 Stat. 62, 83, declared that "the laws of the United States and the State of Arkansas in force in the [Indian] Territory shall apply to all persons therein, irrespective of race," and was practically abrogated when the act of June 28, 1898, c. 517, 30 Stat. 495, abolished all tribal courts in the Indian Territory (§ 28) and provided (§ 26) that "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory." Of course, these congressional enactments operated to displace the Creek tribal laws of descent and distribution and to substitute in their stead the Arkansas law as expressed in Chapter 49 of Mansfield's Digest.

Notwithstanding the situation just mentioned, provisions were inserted in the Original Creek Agreement of March 1, 1901, *supra*, which undoubtedly gave controlling effect to the Creek tribal laws rather than to the Arkansas law; and those provisions embraced allotments to living citizens as well as allotments on behalf of deceased citizens. Thus in § 7 it was provided that, if, after a homestead had served the purposes of its creation, the allottee should die intestate, the land should "descend to his heirs according to the laws of descent and distribution of the Creek Nation;" and in § 28 it was provided that, if a citizen or child entitled to enrollment should die before receiving his allotment and share of the funds of the tribe, the lands and money to which he would be entitled, if living, should "descend to his heirs according to the laws of descent and distribution of the Creek Nation." In other parts of the agreement the word "heirs" was used without any accompanying explanation of who was intended, but this evidently was because the word was intended to have the same signification as in §§ 7 and 28, and therefore no further explanation was necessary.

But the purpose to give effect to the Creek tribal laws was soon changed, for the act of May 27, 1902, c. 888, 32 Stat. 245, 258, not only expressly repealed so much of the act or agreement of March 1, 1901, as provided for descent and distribution according to the Creek tribal laws, but also declared: "and the descent and distribution of lands and moneys provided for in said Act shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory." A little more than a month later what was said in the act of May 27, 1902, was repeated in § 6 of the Supplemental Creek Agreement of June 30, 1902, and was there qualified by two provisos which have an important bearing here. That section reads:

"The provisions of the act of Congress approved March 1, 1901 (31 Stat. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

Applying this section to the facts of this case the Supreme Court of the State held that the father, although an heir according to Chapter 49 of Mansfield's Digest, was excluded by the two provisos from the right to inherit, because he was not a Creek citizen and the mother, who was such citizen, had an inheritable status according to that chapter.

The first contention requiring consideration is that the two provisos do not affect the right to inherit from one

who dies after receiving his allotment, but only the right to receive lands from the tribe in place of one who was entitled to an allotment and died before receiving it. The contention rests upon the words "lands of the Creek Nation" in the first proviso and is sought to be sustained upon the theory that lands which have been allotted and passed into private ownership are no longer lands of the tribe, and therefore not within the provisos. We think the words indicated were merely descriptive of the body of lands which were being allotted in severalty and subjected to the incidents of individual ownership, that is, the lands in the Creek Nation. In that sense they would include the lands as well after allotment as before. The section as a whole shows that it looked to the future no less than to the present, and was intended to prescribe rules of descent applicable to all Creek allotments. Nothing in the provisos indicates that they were to be less comprehensive. Their purpose was to give Creek citizens and their Creek descendants a preferred right to inherit, and no reason is perceived for giving such a preference where a citizen entitled to an allotment died before receiving it that would not be equally applicable if he had died after it was received. We conclude therefore that the contention is not well founded.

It next is insisted that the two provisos were repealed by a provision in the act of April 28, 1904, c. 1824, 33 Stat. 573, reading as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, . . ."

No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication. There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and dis-

tribution without any qualification or restriction. But this would be only by reason of the generality of its terms, for it made no mention of that law or of those lands. In short, it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand, § 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (*United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, *Id.* 556, 570; *Rodgers* v. *United States*, 185 U. S. 83, 87–89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but we think it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians whose affairs were peculiarly within its control. *Taylor* v. *Parker*, *ante*, p. 42. See also *In re Davis' Estate*, 32 Oklahoma, 209.

In the briefs there is considerable discussion of the question whether the mother, through whom the plaintiff

claimed, took the fee simple or only a life estate, but as the judgment against the father was amply sustained in either event that question need not be considered.

The allegations and admissions in one part of the defendant's answer were held to overcome the denials in another and complaint is made of this, but, as it appears that nothing more than a question of local pleading and practice was involved, the ruling is not open to review in this court.

Judgment affirmed.